

WHAT ABOUT THE CHILDREN: HOW CHILDREN OF SAME-SEX COUPLES ARE LEFT WITHOUT STATE-RUN SUPPORT

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I. INTRODUCTION

In 1993, a woman by the initials H.M. became pregnant with her first child through artificial insemination.¹ H.M. and her partner, E.T., had

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1. See *In re H.M. v. E.T.*, 930 N.E.2d 206, 207 (N.Y. 2010) (involving a birth mother's suit for retroactive child support from her former same-sex partner). The procedure—the culmination of several unsuccessful attempts at artificial insemination—was performed and partially funded by her partner. *Id.*

discussed having children early on in their relationship, which began in 1989.² E.T. had a child from a previous relationship, but the couple wanted to have a child together.³ H.M. gave birth to a son in September of 1994, with E.T. at her bedside.⁴ Four months after the birth of the baby, the relationship ended, and H.M. and her son moved to her parent's home in Canada.⁵ E.T. continued to provide financial support for the child, and the couple even attempted to reconcile in 1997.⁶ In 2006, H.M. sought to establish E.T. as a parent and obtain a child support order for their son, which would include retroactive child support⁷ from the time the child was born.⁸ A Family Court Support Magistrate granted a petition to dismiss on lack of subject-matter jurisdiction filed by E.T.⁹ H.M. filed an appeal and the Family Court reversed the dismissal.¹⁰ The Family Court also ordered a hearing to determine if E.T. could be prevented from denying parentage.¹¹ The Appellate Division reinstated the Magistrate's dismissal for lack of subject-matter jurisdiction, and H.M. appealed to the Court of Appeals.¹² The Court of Appeals of New York reversed the decision of the Appellate Division, stating that the court had subject-matter jurisdiction over this case.¹³

The case of H.M. and E.T. represents a growing legal issue that federal and state legislatures have failed to address. Today, many same-sex couples have children together through artificial insemination¹⁴ or surro-

2. *Id.*

3. *Id.* In preparing to have a child together they discussed possible methods of conception, how to properly raise a child, and the relationship the child should have with E.T.'s children. *Id.*

4. *Id.*

5. *Id.*

6. *Id.* "E.T. continued to provide H.M. with gifts for the child and monetary contributions for the child's care at unspecified times after the parties' separation." *Id.*

7. Retroactive child support is also sometimes referred to as "back-pay." See generally TXACCESS.ORG, <http://www.lanwt.org/txaccess/BACKCHILDSUPPORT.ASP> (last visited July 25, 2012).

8. *Id.*

9. *Id.* at 208. The court stated that there was no legal basis for jurisdiction over a former partner with no biological relationship with the child. *Id.* at 207.

10. *Id.*

11. *Id.* The court ordered "a hearing to determine whether E.T. should be equitably estopped from denying parentage and support obligations." *Id.*

12. *Id.*

13. *Id.* at 208-09.

14. See *Gay Marriage and Procreation*, ARGUING EQUALITY, <http://www.arguingequality.org/chapter5.htm#1> (last visited July 30, 2012) (stating that "[s]ome gays and lesbians . . . go the route of artificial insemination or surrogate parenting." Indeed, what many refer to as the 'gayby boom' is no small phenomenon—figures place the number of lesbian mothers in the United States at 1 to 5 million and the number of gay fathers at 1 to 3 million).

gacy.¹⁵ In both scenarios, the child is biologically related to only one of the parents.¹⁶ Oftentimes the non-biological parent adopts the child in order to have legal rights, which is a process that can be costly.¹⁷ A problem arises when a same-sex union ends and the non-biological parent never adopted the child. Not only does the non-biological parent have no legal rights to make decisions regarding the child, but also in many states the partner does not even have legal standing to seek visitation rights.¹⁸ On the other side of the problem, the biological parent is left to raise the child alone because she lacks standing in some states to obtain child support from the non-biological parent.¹⁹ In addition to the lack of basic

15. See *Donor Insemination: The Basics*, HUM. RTS. CAMPAIGN, <http://www.hrc.org/resources/entry/donor-insemination-the-basics> (last visited July 8, 2012) (explaining the two different processes of artificial insemination); see also *Overview of the Surrogacy Process*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/entry/overview-of-the-surrogacy-process> (last visited July 8, 2012) (describing the two types of surrogacy: traditional and gestational).

16. See *Donor Insemination: The Basics*, *supra* note 15 (describing the intracervical insemination as a process in which “the sperm is placed just inside the woman’s cervical opening through the use of a speculum and syringe[,]” and intrauterine insemination as “the sperm [being] placed just inside a woman’s uterus, using a flexible catheter.”); Lindsey E. Harris, *Artificial Insemination and Surrogate Motherhood—A Nursery Full of Unresolved Questions*, 17 WILLAMETTE L. REV. 913, 914 (1980) (defining the process of artificial insemination); *Overview of Surrogacy Process*, HUM. RTS. CAMPAIGN, <http://www.hrc.org/resources/entry/overview-of-the-surrogacy-process> (last visited July 8, 2012). Stating:

[i]n traditional surrogacy, a surrogate mother is artificially inseminated, either by the intended father or an anonymous donor, and carries the baby to term. The child is thereby genetically related to both the surrogate mother, who provides the egg, and the intended father or anonymous donor. In gestational surrogacy, an egg is removed from the intended mother or an anonymous donor and fertilized with the sperm of the intended father or anonymous donor.”). In both processes, it follows that for same-sex couples, only one of the parents can be genetically related to the child, since only one of the eggs or sperm will produce the embryo. Gestational surrogacy is often attractive to lesbian couples “because it permits one woman to contribute her egg and the other to carry the child. *Id.*”

17. See Michael J. Ritter, Note, *Adoption by Same-Sex Couples: Public Policy Issues in Texas Law & Practice*, 15 TEX. J. C.L. & C.R. 235, 254 (2010) (outlining the debate over the two main avenues of same-sex adoption: a joint adoption or a second-parent adoption of the biological child of the other partner).

18. Jason C. Beekman, *In Search of Parity: Child Custody/Visitation and Child Support for Lesbian Couples Under “Companion” Cases Debra H. and In re H.M.* 23 (May 15, 2011) (unpublished graduate paper, Cornell Law School), available at http://scholarship.law.cornell.edu/lps_papers/27.

19. The difficulties surrounding same-sex adoption and parentage have been addressed in pop culture as well. In HBO’s critically acclaimed series, *The Wire*, Detective Shakima “Kima” Greggs reluctantly has a child with her partner. *The Wire* (HBO television broadcast 2002–2008). Not long after the birth of the child, the couple separated, and Kima devoted the majority of her time to her work. *Id.* Once Kima received a significant bonus, she took a child support check to her former partner and said, “thanks for not

legal rights regarding parents' obligations to their children, many states do not recognize same-sex marriage,²⁰ and therefore the state-run agencies that enforce child support and visitation rights do not accept cases involving children of same-sex couples.²¹ Without having the state intervene on behalf of the child's interest, many couples that want a remedy to this frequently occurring problem are left with private litigation, which is both costly and uncertain.²² Ultimately, the children of same-sex unions are left without the financial or emotional support of one of the parents, and with significantly fewer rights than children from opposite-sex unions.

Part II of this Comment will provide a legal background for child support, including the requirements for states as set forth by the Uniform Interstate Family Support Act.²³ Since the Federal Government has left the states to determine the method of child support available, Part II will also explore how the state of Texas, as a model, has implemented the federal regulations.

Part III will explore the laws in a few select states that have defense of marriage acts versus those that do not, specifically Texas, Missouri, New York, California, Montana, Wisconsin, and Ohio. Part III will also discuss the various problems that arise for families as a result of the current laws. The primary issues that affect these couples include conservatorship, visitation, and child support payment problems. Currently, state courts are responsible for determining the legality of establishing and en-

coming after me for this." *Id.* Kima's former partner was an attorney, so it can be assumed that she would take legal action had she continued not receiving child support from Kima. *Id.* Later in the series, Kima begins to develop a relationship with her non-biological son, including an overnight visit. *Id.* Luckily for the couple, they had an amicable separation, with both parents actively participating in the way parents should; however, it is important to note that this situation does not always happen and the litigation in this area is very uncertain. *Id.*

20. See Chase D. Anderson, *A Quest for Fair and Balanced: The Supreme Court, State Courts, and The Future of Same-Sex Marriage Review After Perry*, 60 DUKE L.J. 1413, 1432 (2010) (analyzing the legal perspectives of same-sex marriage, including a background of the neutral standpoint the Supreme Court has taken thus far in "the culture war surrounding sexual orientation," and exploring current and future legal treatment of same-sex marriage).

21. See *State v. Naylor*, 330 S.W.3d 434, 437 (Tex. App.—Austin 2011, pet. filed) (evincing Texas' opposition to litigation surrounding same-sex marriage, even the divorce of a married couple, particularly noted by their insistence on intervening in this case regardless of the lack of a constitutional challenge or need to defend a Texas statute).

22. See *Peebles v. Peebles*, 562 S.W.2d 503, 506 (Tex. App.—San Antonio 1978, no writ) (demonstrating the cost of private litigation can easily be in the thousands).

23. See generally Uniform Interstate Family Support Act, 42 U.S.C. § 666(f) (2006) (describing the procedures each state must enact into law in order to comply with the Act).

forcing child support orders for same-sex couples when state law is ambiguous and unsettled.

Part IV will propose that states should enact legislation that establishes same-sex partners as legal parents with the same rights and responsibilities to their children as opposite-sex partners. This solution would remove the burden from courts and provide for uniformity between the states. Child support enforcement agencies would then be able to intervene in cases involving children from same-sex unions, which would lower the cost of private litigation that homosexual parents are currently left with. Only then would the children of same-sex unions finally receive the same benefits as children from heterosexual unions.

II. LEGAL BACKGROUND

A. *Child Support*

1. Historical Background

In the early 1900s, the Federal Government was concerned about children failing to get the financial support they deserved.²⁴ With broken families and single parents, children were suffering from one parent's failure to provide support.²⁵ It was not until Congress passed the Social Security Act of 1975 that the Title IV-D concept was devised as a solution to the child support problem.²⁶ The creation of the IV-D state agencies however, was not without its problems. The idea was that agencies would be established to serve families that were on welfare. Congress did not want to exclude anyone from receiving these new services, so the IV-D agency services were also offered to anyone not receiving government financial assistance for a nominal fee.²⁷ The difficulty with this concept was that the agencies were underfunded and ill-equipped to handle the demanding caseload.²⁸

Another issue arose when Congress enacted the Uniform Interstate Family Support Act (UIFSA).²⁹ UIFSA permits the state that originally established the child support order to maintain jurisdiction over the order

24. See Daniel Robert Zmijewski, *The Child Support Recovery Act and Its Constitutionality after U.S. v. Morrison*, NAT'L COAL. FOR CIV. RTS. 289, 290 (2009), http://www.nccr.info/attachments/394_zmijewski.pdf (detailing the Aid to Families with Dependent Children Act, also known as welfare).

25. *Id.* Often, the children's fathers were disabled, deceased, or had abandoned their families. *Id.*

26. *Id.* at 291.

27. *Id.* at 292.

28. *Id.* The so-called solution quickly became a "bureaucratic nightmare" because of case overload and incongruent state systems. *Id.*

29. Uniform Interstate Family Support Act of 1993, 42 U.S.C. § 666(f) (2007).

regardless of whether the person subject to the order moved to another state.³⁰ It became apparent that the states needed to be able to rely on some sort of criminal action in order to properly enforce child support actions against non-paying parents because each state applied its respective penal codes, which were not always the same.³¹ Congress responded in 1992 with the Child Support Recovery Act (CSRA),³² and in 1998 with the Deadbeat Parent's Punishment Act (DPPA).³³ The CSRA imposed criminal sanctions against parents who failed to pay child support across state lines.³⁴ The DPPA made punishments much more stringent for non-paying parents and imposed a more severe maximum jail sentence.³⁵ The CSRA and DPPA are only applicable in circumstances in which the non-custodial parent and the custodial parent live in different states.³⁶ The movement toward harsher punishments for non-supportive parents also became a trend among state agencies because they could still set guidelines for cases where both the custodial and noncustodial parent continued to live in the same state.³⁷ Therefore, federal guidelines had a significant effect on the way the state legislatures set up their IV-D agencies, as will be discussed below.

2. Federal Guidelines

The Federal Government set guidelines for states to establish IV-D agencies that would oversee all aspects of child support, including establishing paternity, collecting and distributing child support, and enforcing child support orders.³⁸ The United States Code is the authority that set

30. *Id.*; Zmijewski, *supra* note 24, at 292. Jurisdiction over the person was established by using long arm jurisdiction provisions. *Id.* See generally The Uniform Child Custody Jurisdiction and Enforcement Act, TEX. FAM. CODE §§ 152.001-152.317 (demonstrating the state implementation of the federal act).

31. Zmijewski, *supra* note 24, at 293.

32. Child Support Recovery Act, 18 U.S.C. § 228 (1992).

33. Deadbeat Parents Punishment Act, 18 U.S.C. § 228 (1998). Zmijewski, *supra* note 24, at 293. When CSRA was passed, four million parents not paying support were "turned into potential federal criminals." *Id.*

34. Child Support Recovery Act, 18 U.S.C. § 228 (1992). Zmijewski, *supra* note 24, at 293. The passing of this Act marked the first time in American history that failure to pay child support across state lines was a federal criminal offense. *Id.*

35. Deadbeat Parents Punishment Act, 18 U.S.C.A. § 228 (1998). Zmijewski, *supra* note 24, at 293.

36. Zmijewski, *supra* note 24, at 294. Mr. Zmijewski argues that moving out of state is not required for the CSRA and DPPA to take effect. *Id.* "For example, if a non-supportive parent's child is moved out of the state by the custodial parent and the non-supportive parent remains in the original state and chooses not to pay support, then the parent can be held liable under the CSRA and end up in jail." *Id.*

37. *Id.* at 295.

38. 42 U.S.C. § 654 (2009).

A State plan for child and spousal support must—(1) provide that it shall be in effect in all political subdivisions of the State; (2) provide for financial participation by the State; (3) provide for the establishment or designation of a single and separate organizational unit, which meets such staffing and organizational requirements as the Secretary may by regulation prescribe, within the State to administer the plan; (4) provide that the State will—(A) provide services relating to the establishment of paternity or the establishment, modification, or enforcement of child support obligations, as appropriate, under the plan with respect to—(i) each child for whom (I) assistance is provided under the State program funded under part A of this subchapter, (II) benefits or services for foster care maintenance are provided under the State program funded under part E of this subchapter, (III) medical assistance is provided under the State plan approved under subchapter XIX of this chapter, or (IV) cooperation is required pursuant to section 2015(l)(1) of Title 7, unless, in accordance with paragraph (29), good cause or other exceptions exist; (ii) any other child, if an individual applies for such services with respect to the child; and (B) enforce any support obligation established with respect to—(i) a child with respect to whom the State provides services under the plan; or (ii) the custodial parent of such a child; (5) provide that (A) in any case in which support payments are collected for an individual with respect to whom an assignment pursuant to section 608(a)(3) of this title is effective, such payments shall be made to the State for distribution pursuant to section 657 of this title and shall not be paid directly to the family, and the individual will be notified on a monthly basis (or on a quarterly basis for so long as the Secretary determines with respect to a State that requiring such notice on a monthly basis would impose an unreasonable administrative burden) of the amount of the support payments collected, and (B) in any case in which support payments are collected for an individual pursuant to the assignment made under section 1396k of this title, such payments shall be made to the State for distribution pursuant to section 1396k of this title, except that this clause shall not apply to such payments for any month after the month in which the individual ceases to be eligible for medical assistance; (6) provide that—(A) services under the plan shall be made available to residents of other States on the same terms as to residents of the State submitting the plan; (B)(i) an application fee for furnishing such services shall be imposed on an individual, other than an individual receiving assistance under a State program funded under part or E of this subchapter, or under a State plan approved under subchapter XIX of this chapter, or who is required by the State to cooperate with the State agency administering the program under this part pursuant to subsection (l) or (m) of section 2015 of Title 7, and shall be paid by the individual applying for such services, or recovered from the absent parent, or paid by the State out of its own funds (the payment of which from State funds shall not be considered as an administrative cost of the State for the operation of the plan, and shall be considered income to the program), the amount of which (I) will not exceed \$25 (or such higher or lower amount (which shall be uniform for all States) as the Secretary may determine to be appropriate for any fiscal year to reflect increases or decreases in administrative costs), and (II) may vary among such individuals on the basis of ability to pay (as determined by the State); and (ii) in the case of an individual who has never received assistance under a State program funded under part A of this subchapter and for whom the State has collected at least \$500 of support, the State shall impose an annual fee of \$25 for each case in which services are furnished, which shall be retained by the State from support collected on behalf of the individual (but not from the first \$500 so collected), paid by the individual applying for the services, recovered from the absent parent, or paid by the State out of its own funds (the pay-

ment of which from State funds shall not be considered as an administrative cost of the State for the operation of the plan, and the fees shall be considered income to the program). *Id.* (7) provide for entering into cooperative arrangements with appropriate courts and law enforcement officials and Indian tribes or tribal organizations (as defined in subsections (e) and (l) of section 450b of Title 25) (A) to assist the agency administering the plan, including the entering into of financial arrangements with such courts and officials in order to assure optimum results under such program, and (B) with respect to any other matters of common concern to such courts or officials and the agency administering the plan; (8) provide that, for the purpose of establishing parentage, establishing, setting the amount of, modifying, or enforcing child support obligations, or making or enforcing a child custody or visitation determination, as defined in section 663(d)(1) of this title, the agency administering the plan will establish a service to locate parents utilizing—(A) all sources of information and available records; and (B) the Federal Parent Locator Service established under section 653 of this title, and shall, subject to the privacy safeguards required under paragraph (26), disclose only the information described in sections 653 and 663 of this title to the authorized persons specified in such sections for the purposes specified in such sections; (9) provide that the State will, in accordance with standards prescribed by the Secretary, cooperate with any other State—(A) in establishing paternity, if necessary; (B) in locating a noncustodial parent residing in the State (whether or not permanently) against whom any action is being taken under a program established under a plan approved under this part in another State; (C) in securing compliance by a noncustodial parent residing in such State (whether or not permanently) with an order issued by a court of competent jurisdiction against such parent for the support and maintenance of the child or children or the parent of such child or children with respect to whom aid is being provided under the plan of such other State; (D) in carrying out other functions required under a plan approved under this part; and (E) not later than March 1, 1997, in using the forms promulgated pursuant to section 652(a)(11) of this title for income withholding, imposition of liens, and issuance of administrative subpoenas in interstate child support cases; (10) provide that the State will maintain a full record of collections and disbursements made under the plan and have an adequate reporting system; (11)(A) provide that amounts collected as support shall be distributed as provided in section 657 of this title; and (B) provide that any payment required to be made under section 656 or 657 of this title to a family shall be made to the resident parent, legal guardian, or caretaker relative having custody of or responsibility for the child or children; (12) provide for the establishment of procedures to require the State to provide individuals who are applying for or receiving services under the State plan, or who are parties to cases in which services are being provided under the State plan—(A) with notice of all proceedings in which support obligations might be established or modified; and (B) with a copy of any order establishing or modifying a child support obligation, or (in the case of a petition for modification) a notice of determination that there should be no change in the amount of the child support award, within 14 days after issuance of such order or determination; (13) provide that the State will comply with such other requirements and standards as the Secretary determines to be necessary to the establishment of an effective program for locating noncustodial parents, establishing paternity, obtaining support orders, and collecting support payments and provide that information requests by parents who are residents of other States be treated with the same priority as requests by parents who are residents of the State submitting the plan; (14)(A) comply with such bonding requirements, for employees who receive, disburse, handle, or have access to, cash, as

the Secretary shall by regulations prescribe; (B) maintain methods of administration which are designed to assure that persons responsible for handling cash receipts shall not participate in accounting or operating functions which would permit them to conceal in the accounting records the misuse of cash receipts (except that the Secretary shall by regulations provide for exceptions to this requirement in the case of sparsely populated areas where the hiring of unreasonable additional staff would otherwise be necessary); (15) provide for—(A) a process for annual reviews of and reports to the Secretary on the State program operated under the State plan approved under this part, including such information as may be necessary to measure State compliance with Federal requirements for expedited procedures, using such standards and procedures as are required by the Secretary, under which the State agency will determine the extent to which the program is operated in compliance with this part; and (B) a process of extracting from the automated data processing system required by paragraph (16) and transmitting to the Secretary data and calculations concerning the levels of accomplishment (and rates of improvement) with respect to applicable performance indicators (including paternity establishment percentages) to the extent necessary for purposes of sections 652(g) and 658a of this title; (16) provide, for the establishment and operation by the State agency in accordance with an (initial and annually updated) advance automated data processing planning document approved under section 652(d) of this title, of a statewide automated data processing and information retrieval system meeting the requirements of section 654a of this title designed effectively and efficiently to assist management in the administration of the State plan, so as to control, account for, and monitor all the factors in the support enforcement collection and paternity determination process under such plan; (17) provide that the State will have in effect an agreement with the Secretary entered into pursuant to section 663 of this title for the use of the Parent Locator Service established under section 653 of this title, and provide that the State will accept and transmit to the Secretary requests for information authorized under the provisions of the agreement to be furnished by such Service to authorized persons, will impose and collect (in accordance with regulations of the Secretary) a fee sufficient to cover the costs to the State and to the Secretary incurred by reason of such requests, will transmit to the Secretary from time to time (in accordance with such regulations) so much of the fees collected as are attributable to such costs to the Secretary so incurred, and during the period that such agreement is in effect will otherwise comply with such agreement and regulations of the Secretary with respect thereto; (18) provide that the State has in effect procedures necessary to obtain payment of past-due support from overpayments made to the Secretary of the Treasury as set forth in section 664 of this title, and take all steps necessary to implement and utilize such procedures; (19) provide that the agency administering the plan—(A) shall determine on a periodic basis, from information supplied pursuant to section 508 of the Unemployment Compensation Amendments of 1976, whether any individuals receiving compensation under the State's unemployment compensation law (including amounts payable pursuant to any agreement under any Federal unemployment compensation law) owe child support obligations which are being enforced by such agency; and (B) shall enforce any such child support obligations which are owed by such an individual but are not being met—(i) through an agreement with such individual to have specified amounts withheld from compensation otherwise payable to such individual and by submitting a copy of any such agreement to the State agency administering the unemployment compensation law; or (ii) in the absence of such an agreement, by bringing legal process (as defined in section 659(i)(5) of this title) to require the withholding of amounts

from such compensation; (20) provide, to the extent required by section 666 of this title, that the State (A) shall have in effect all of the laws to improve child support enforcement effectiveness which are referred to in that section, and (B) shall implement the procedures which are prescribed in or pursuant to such laws; (21)(A) at the option of the State, impose a late payment fee on all overdue support (as defined in section 666(e) of this title) under any obligation being enforced under this part, in an amount equal to a uniform percentage determined by the State (not less than 3 percent nor more than 6 percent) of the overdue support, which shall be payable by the noncustodial parent owing the overdue support; and (B) assure that the fee will be collected in addition to, and only after full payment of, the overdue support, and that the imposition of the late payment fee shall not directly or indirectly result in a decrease in the amount of the support which is paid to the child (or spouse) to whom, or on whose behalf, it is owed; (22) in order for the State to be eligible to receive any incentive payments under Section 658a of this title, provide that, if one or more political subdivisions of the State participate in the costs of carrying out activities under the State plan during any period, each such subdivision shall be entitled to receive an appropriate share (as determined by the State) of any such incentive payments made to the State for such period, taking into account the efficiency and effectiveness of the activities carried out under the State plan by such political subdivision; (23) provide that the State will regularly and frequently publicize, through public service announcements, the availability of child support enforcement services under the plan and otherwise, including information as to any application fees for such services and a telephone number or postal address at which further information may be obtained and will publicize the availability and encourage the use of procedures for voluntary establishment of paternity and child support by means the State deems appropriate; (24) provide that the State will have in effect an automated data processing and information retrieval system—(A) by October 1, 1997, which meets all requirements of this part which were enacted on or before October 13, 1988; and (B) by October 1, 2000, which meets all requirements of this part enacted on or before August 22, 1996, except that such deadline shall be extended by 1 day for each day (if any) by which the Secretary fails to meet the deadline imposed by section 344(a)(3) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996; (25) provide that if a family with respect to which services are provided under the plan ceases to receive assistance under the State program funded under part A of this subchapter, the State shall provide appropriate notice to the family and continue to provide such services, subject to the same conditions and on the same basis as in the case of other individuals to whom services are furnished under the plan, except that an application or other request to continue services shall not be required of such a family and paragraph (6)(B) shall not apply to the family; (26) have in effect safeguards, applicable to all confidential information handled by the State agency, that are designed to protect the privacy rights of the parties, including—(A) safeguards against unauthorized use or disclosure of information relating to proceedings or actions to establish paternity, or to establish, modify, or enforce support, or to make or enforce a child custody determination; (B) prohibitions against the release of information on the whereabouts of 1 party or the child to another party against whom a protective order with respect to the former party or the child has been entered; (C) prohibitions against the release of information on the whereabouts of 1 party or the child to another person if the State has reason to believe that the release of the information to that person may result in physical or emotional harm to the party or the child; (D) in cases in which the prohibitions under subparagraphs (B) and (C) apply, the requirement to notify the Secretary, for pur-

poses of section 653(b)(2) of this title, that the State has reasonable evidence of domestic violence or child abuse against a party or the child and that the disclosure of such information could be harmful to the party or the child; and (E) procedures providing that when the Secretary discloses information about a parent or child to a State court or an agent of a State court described in section 653(c)(2) or 663(d)(2)(B) of this title, and advises that court or agent that the Secretary has been notified that there is reasonable evidence of domestic violence or child abuse pursuant to section 653(b)(2) of this title, the court shall determine whether disclosure to any other person of information received from the Secretary could be harmful to the parent or child and, if the court determines that disclosure to any other person could be harmful, the court and its agents shall not make any such disclosure; (27) provide that, on and after October 1, 1998, the State agency will—(A) operate a State disbursement unit in accordance with section 654b of this title; and (B) have sufficient State staff (consisting of State employees) and (at State option) contractors reporting directly to the State agency to—(i) monitor and enforce support collections through the unit in cases being enforced by the State pursuant to paragraph 4 (including carrying out the automated data processing responsibilities described in section 654a(g) of this title); and (ii) take the actions described in section 666(c)(1) of this title in appropriate cases; (28) provide that, on and after October 1, 1997, the State will operate a State Directory of New Hires in accordance with section 653a of this title; (29) provide that the State agency responsible for administering the State plan—(A) shall make the determination (and redetermination at appropriate intervals) as to whether an individual who has applied for or is receiving assistance under the State program funded under part A of this subchapter, the State program under part E of this subchapter, the State program under subchapter XIX of this chapter, or the supplemental nutrition assistance program, as defined under section 2012(l) of Title 7, is cooperating in good faith with the State in establishing the paternity of, or in establishing, modifying, or enforcing a support order for, any child of the individual by providing the State agency with the name of, and such other information as the State agency may require with respect to, the noncustodial parent of the child, subject to good cause and other exceptions which—(i) in the case of the State program funded under part A of this subchapter, the State program under part E of this subchapter, or the State program under subchapter XIX of this chapter shall, at the option of the State, be defined, taking into account the best interests of the child, and applied in each case, by the State agency administering such program; and (ii) in the case of the supplemental nutrition assistance program, as defined under section 2012(l) of Title 7, shall be defined and applied in each case under that program in accordance with section 2015(l)(2) of Title 7; (B) shall require the individual to supply additional necessary information and appear at interviews, hearings, and legal proceedings; (C) shall require the individual and the child to submit to genetic tests pursuant to judicial or administrative order; (D) may request that the individual sign a voluntary acknowledgment of paternity, after notice of the rights and consequences of such an acknowledgment, but may not require the individual to sign an acknowledgment or otherwise relinquish the right to genetic tests as a condition of cooperation and eligibility for assistance under the State program funded under part A of this subchapter, the State program under part E of this subchapter, the State program under subchapter XIX of this chapter, or the supplemental nutrition assistance program, as defined under section 2012(l) of Title 7; and (E) shall promptly notify the individual and the State agency administering the State program funded under part A of this subchapter, the State agency administering the State program under part E of this subchapter, the State agency administering the State program

the regulations for the states to follow when developing their plans. Section 654 of the United States Code discusses some of the IV-D agency's

under subchapter XIX of this chapter, or the State agency administering the supplemental nutrition assistance program, as defined under section 2012(l) of Title 7, of each such determination, and if noncooperation is determined, the basis therefore; (30) provide that the State shall use the definitions established under section 652(a)(5) of this title in collecting and reporting information as required under this part; (31) provide that the State agency will have in effect a procedure for certifying to the Secretary, for purposes of the procedure under section 652(k) of this title, determinations that individuals owe arrearages of child support in an amount exceeding \$2,500, under which procedure—(A) each individual concerned is afforded notice of such determination and the consequences thereof, and an opportunity to contest the determination; and (B) the certification by the State agency is furnished to the Secretary in such format, and accompanied by such supporting documentation, as the Secretary may require; (32)(A) provide that any request for services under this part by a foreign reciprocating country or a foreign country with which the State has an arrangement described in section 659a(d) of this title shall be treated as a request by a State; (B) provide, at State option, notwithstanding paragraph (4) or any other provision of this part, for services under the plan for enforcement of a spousal support order not described in paragraph (4)(B) entered by such a country (or subdivision); and (C) provide that no applications will be required from, and no costs will be assessed for such services against, the foreign reciprocating country or foreign obligee (but costs may at State option be assessed against the obligor); (33) provide that a State that receives funding pursuant to section 628 of this title and that has within its borders Indian country (as defined in section 1151 of Title 18) may enter into cooperative agreements with an Indian tribe or tribal organization (as defined in subsections (e) and (l) of section 450b of Title 25), if the Indian tribe or tribal organization demonstrates that such tribe or organization has an established tribal court system or a Court of Indian Offenses with the authority to establish paternity, establish, modify, or enforce support orders, or to enter support orders in accordance with child support guidelines established or adopted by such tribe or organization, under which the State and tribe or organization shall provide for the cooperative delivery of child support enforcement services in Indian country and for the forwarding of all collections pursuant to the functions performed by the tribe or organization to the State agency, or conversely, by the State agency to the tribe or organization, which shall distribute such collections in accordance with such agreement; and (34) include an election by the State to apply section 657(a)(2)(B) of this title or former section 657(a)(2)(B) of this title (as in effect for the State immediately before the date this paragraph first applies to the State) to the distribution of the amounts which are the subject of such sections and, for so long as the State elects to so apply such former section, the amendments made by subsection (b)(1) of section 7301 of the Deficit Reduction Act of 2005 shall not apply with respect to the State, notwithstanding subsection (e) of such section 7301. The State may allow the jurisdiction which makes the collection involved to retain any application fee under paragraph (6)(B) or any late payment fee under paragraph (21). Nothing in paragraph (33) shall void any provision of any cooperative agreement entered into before August 22, 1996, nor shall such paragraph deprive any State of jurisdiction over Indian country (as so defined) that is lawfully exercised under section 1322 of Title 25.

Id.

responsibilities.³⁹ In cases where a child is born out-of-wedlock, the IV-D agency will establish the paternity, if necessary; if paternity has already been assigned, the agency will use all resources, including a parent-locator to find the parent, commence a lawsuit, and retrieve the child support that is owed.⁴⁰ In addition, even though the IV-D agency is set up by the state, it must comply with all applicable federal regulations.⁴¹ While the regulations are both extensive and specific in their guidelines, they fail to define situations, such as key procedural matters, where the IV-D agency will intervene. The absence of such a concrete definition provides an opportunity for states to limit the function of IV-D agencies through defense of marriage acts as discussed below.

3. State Implementation

Texas has established the IV-D agency as part of the responsibility of the Attorney General and serves as an example of how some states have incorporated federal guidelines.⁴² The Attorney General's office has the authority to determine how child support should be collected and to enforce child support orders through legal action.⁴³ The services available through the Office of the Attorney General are: parent locator, determination of paternity, establishment of child support and medical support, review and modification of child support orders every three years, order enforcement, and child support payment collection and distribution.⁴⁴

39. See generally 42 U.S.C. § 654 (2009).

40. *Id.* § 654(8)–(9).

41. See *id.* § 654 (explaining what the individual state's plans must be regarding child and spousal support).

42. See TEX. FAM. CODE § 231.001 (2008) (stating, “[t]he office of the attorney general is designated as the state’s Title IV-D agency.”).

43. See *id.* § 231.002. The statute explains that the agency may: “(1) accept, transfer, and expend funds, subject to the General Appropriations Act . . . ; (2) adopt rules for the provision of child support services; (3) initiate legal actions needed to implement this chapter; and (4) enter into contracts or agreements necessary to administer this chapter.” *Id.*

44. *Id.* § 231.101.

(a) The Title IV-D agency may provide all services required or authorized to be provided by Part D of Title IV of the federal Social Security Act (42 U.S.C. Section 651 et seq.), including: (1) parent locator services; (2) paternity determination; (3) child support and medical support establishment; (4) review and adjustment of child support orders; (5) enforcement of child support and medical support orders; and (6) collection and distribution of child support payments. (b) At the request of either the obligee or obligor, the Title IV-D agency shall review a child support order once every three years and, if appropriate, adjust the support amount to meet the requirements of the child support guidelines under Chapter 154. (c) Except as notice is included in the child support order, a party subject to a support order shall be provided notice not less than once every three years of the party's right to request that the Title IV-D agency review and, if appropriate, adjust the amount of ordered support. (d) The Title IV-D

The agency services are available to anyone in the state, "without regard to whether the child has received public assistance."⁴⁵ In addition to establishing paternity and child support orders, the agency also collects child support payments through the noncustodial parent's employer or other means, such as collecting tax returns. This is done in order to distribute the funds to the custodial parent.⁴⁶ There are no regulations dictating how the custodial parent must use the funds collected, except that

agency may review a support order at any time on a showing of a material and substantial change in circumstances, taking into consideration the best interests of the child. (e) The Title IV-D agency shall distribute a child support payment received by the agency from an employer within two working days after the date the agency receives the payment.

Id.

45. *Id.* § 231.102. "The Title IV-D agency on application or as otherwise authorized by law may provide services for the benefit of a child without regard to whether the child has received public assistance." *Id.* Families who are receiving public assistance are automatically included in the services through assignment of child support. *See id.* §231.104. The statute states:

[t]o the extent authorized by federal law, the approval of an application for or the receipt of financial assistance as provided by Chapter 31, Human Resources Code, constitutes an assignment to the Title IV-D agency of any rights to support from any other person that the applicant or recipient may have personally or for a child for whom the applicant or recipient is claiming assistance.

Id. Also, "[a]n application for child services is an assignment of support rights to enable the Title IV-D agency to establish and enforce child support and medical support obligations, but an assignment is not a condition of eligibility for services." *Id.*

46. *Id.* § 159.310.

(a) The Title IV-D agency is the state information agency under this chapter. (b) The state information agency shall: (1) compile and maintain a current list, including addresses, of the tribunals in this state that have jurisdiction under this chapter and any support enforcement agencies in this state and send a copy to the state information agency of every other state; (2) maintain a register of names and addresses of tribunals and support enforcement agencies received from other states; (3) forward to the appropriate tribunal in the county in this state where the obligee who is an individual or the obligor resides, or where the obligor's property is believed to be located, all documents concerning a proceeding under this chapter received from an initiating tribunal or the state information agency of the initiating state; and (4) obtain information concerning the location of the obligor and the obligor's property in this state not exempt from execution, by such means as postal verification and federal or state locator services, examination of telephone directories, requests for the obligor's address from employers, and examination of governmental records, including, to the extent not prohibited by other law, those relating to real property, vital statistics, law enforcement, taxation, motor vehicles, driver's licenses, and social security.

Id. "The Title IV-D agency shall maintain a toll-free telephone number at which personnel are available during normal business hours to answer questions from employers responsible for withholding child support. The Title IV-D agency shall inform employers about the toll-free telephone number." *Id.*

the custodial parent is expected to use the funds for the child.⁴⁷ As previously stated, Congress became more stringent in enforcing laws regarding failure to provide child support.⁴⁸ The Office of the Attorney General

47. See *id.* § 234.007 (discussing the notice of place of payment, and once it has been distributed to the custodial parent, it is up to them to decide how to spend it).

(a) The Title IV-D agency shall notify the courts that the state disbursement unit has been established. After receiving notice of the establishment of the state disbursement unit, a court that orders income to be withheld for child support shall order that all income withheld for child support be paid to the state disbursement unit. (b) In order to redirect payments from a local registry to the state disbursement unit after the date of the establishment of the state disbursement unit, the Title IV-D agency shall issue a notice of place of payment informing the obligor, obligee, and employer that income withheld for child support is to be paid to the state disbursement unit. (c) A copy of the notice under Subsection (b) shall be filed with the court of continuing jurisdiction and with the local child support registry. (d) The notice under Subsection (b) must include: (1) the name of the child for whom support is ordered and of the person to whom support is ordered by the court to be paid; (2) the style and cause number of the case in which support is ordered; and (3) instructions for the payment of ordered support to the state disbursement unit. (e) On receipt of a copy of the notice under Subsection (b), the clerk of the court shall file the notice in the appropriate case file. (f) The notice under Subsection (b) may be used by the Title IV-D agency to redirect child support payments from the state disbursement unit of this state to the state disbursement unit of another state.

Id. See also *id.* § 234.008 (discussing the deposit, distribution and issuance of payment).

(a) Not later than the second business day after the date the state disbursement unit receives a child support payment, the state disbursement unit shall distribute the payment to the Title IV-D agency or the obligee. (b) The state disbursement unit shall deposit daily all child support payments in a trust fund with the state comptroller. Subject to the agreement of the comptroller, the state disbursement unit may issue checks from the trust fund.

Id. See also *id.* § 234.009 (discussing the official child support payment record).

(a) The record of child support payments maintained by a local registry is the official record of a payment received directly by the local registry. (b) The record of child support payments maintained by the state disbursement unit is the official record of a payment received directly by the unit. (c) After the date child support payments formerly received by a local registry are redirected to the state disbursement unit, a local registry may accept a record of payments furnished by the state disbursement unit and may add the payments to the record of payments maintained by the local registry so that a complete payment record is available for use by the court. (d) If the local registry does not add payments received by the state disbursement unit to the record maintained by the registry as provided by Subsection (c), the official record of child support payments consists of the record maintained by the local registry for payments received directly by the registry and the record maintained by the state disbursement unit for payments received directly by the unit.

Id.

48. See TEX. FAM. CODE § 234.007 (2008) (explaining the duties of the noncustodial parent to the state).

(a) A person obligated to pay child support in a case in which the Title IV-D agency is providing services under this chapter who does not pay the required support is in-

Child Support Division employs various child support officers whose job it is to collect child support payments from non-paying noncustodial parents.⁴⁹ In addition to child support officers, the agency employs attorneys who institute legal action against the non-paying, noncustodial parents.⁵⁰

debted to the state for the purposes of Section 403.055, Government Code, if the Title IV-D agency has reported the person to the comptroller under that section properly. (b) The amount of a person's indebtedness to the state under Subsection (a) is equal to the sum of: (1) the amount of the required child support that has not been paid; and (2) any interest, fees, court costs, or other amounts owed by the person because the person has not paid the support. (c) The Title IV-D agency is the sole assignee of all payments, including payments of compensation, by the state to a person indebted to the state under Subsection (a). (d) On request of the Title IV-D agency: (1) the comptroller shall make payable and deliver to the agency any payments for which the agency is the assignee under Subsection (c), if the comptroller is responsible for issuing warrants or initiating electronic funds transfers to make those payments; and (2) a state agency shall make payable and deliver to the Title IV-D agency any payments for which the Title IV-D agency is the assignee under Subsection (c) if the comptroller is not responsible for issuing warrants or initiating electronic funds transfers to make those payments. (e) A person indebted to the state under Subsection (a) may eliminate the debt by: (1) paying the entire amount of the debt; or (2) resolving the debt in a manner acceptable to the Title IV-D agency. (f) The comptroller or a state agency may rely on a representation by the Title IV-D agency that: (1) a person is indebted to the state under Subsection (a); or (2) a person who was indebted to the state under Subsection (a) has eliminated the debt.

Id.

49. *Id.* § 159.310.

50. *Id.* § 231.109.

(a) Attorneys employed by the Title IV-D agency may represent this state or another state in an action brought under the authority of federal law or this chapter. (b) The Title IV-D agency may contract with private attorneys, other private entities, or political subdivisions of the state to provide services in Title IV-D cases. (c) The Title IV-D agency shall provide copies of all contracts entered into under this section to the Legislative Budget Board and the Governor's Office of Budget and Planning, along with a written justification of the need for each contract, within 60 days after the execution of the contract. (d) An attorney employed to provide Title IV-D services represents the interest of the state and not the interest of any other party. The provision of services by an attorney under this chapter does not create an attorney-client relationship between the attorney and any other party. The agency shall, at the time an application for child support services is made, inform the applicant that neither the Title IV-D agency nor any attorney who provides services under this chapter is the applicant's attorney and that the attorney providing services under this chapter does not provide legal representation to the applicant. (e) An attorney employed by the Title IV-D agency or as otherwise provided by this chapter may not be appointed or act as an amicus attorney or attorney ad litem for a child or another party.

Id. Such legal action may result in jail time in cases where retroactive support has accrued over time and the noncustodial parent has a history of nonpayment. Attorney General of Texas, *Child Support Enforcement Brings Hope to Texas Families*, (Jan. 3, 2008), https://www.oag.state.tx.us/alerts/alerts_view.php?id=178&type=3.

The Office of the Attorney General also provides referral to employment programs for noncustodial parents who are unemployed and therefore unable to provide the support ordered.⁵¹ All of these state-run benefits come from the formation of the Title IV-D agency, and are provided to families who qualify under state eligibility requirements.⁵²

4. Visitation and Conservatorship

Similar to the way that states have established child support collection processes, state IV-D agencies also have the authority to regulate visita-

51. TEX. FAM. § 231.117.

(a) The Title IV-D agency shall refer to appropriate state and local entities that provide employment services any unemployed or underemployed obligor who is in arrears in court-ordered child support payments. (b) A referral under Subsection (a) may include: (1) skills training and job placement through: (A) the Texas Workforce Commission; or (B) the agency responsible for the food stamp employment and training program (7 U.S.C. Section 2015(d)); (2) referrals to education and literacy classes; and (3) counseling regarding: (A) substance abuse; (B) parenting skills; (C) life skills; and (D) mediation techniques. (c) The Title IV-D agency may require an unemployed or underemployed obligor to complete the training, classes, or counseling to which the obligor is referred under this section. The agency shall suspend under Chapter 232 the license of an obligor who fails to comply with the requirements of this subsection. (d) A court or the Title IV-D agency may issue an order that requires the parent to either work, have a plan to pay overdue child support, or participate in work activities appropriate to pay the overdue support.

Id. Despite the non-custodial parents unemployment, the court can still order child support and the calculation of the amount due is based on a minimum wage presumption. The choices program is a way for the Attorney General's office to provide assistance to the noncustodial parent to obtain employment and consequently make their child support payments thus fulfilling their financial obligations as parents. *NCP Choices*, ATTORNEY GEN. OF TEX., <https://www.oag.state.tx.us/cs/parents/faq.shtml#apply> (last visited June 24, 2012).

52. Attorney General of Texas, *Child Support: Frequently Asked Questions*, (Dec. 9, 2011), <https://www.oag.state.tx.us/cs/parents/faq.shtml#apply>.

The Attorney General's office accepts applications from mothers, fathers and other individuals who request services. Our attorneys represent the State of Texas in providing child support services and do not represent either parent in the case. Customers do not have the right to select what enforcement actions are taken in their cases. The Office of the Attorney General is required to provide all appropriate services for the benefit of the children. Temporary Assistance for Needy Families (TANF) and certain Medicaid recipients automatically receive child support services after they are certified for public assistance. Persons who do not receive TANF or Medicaid must apply for child support services. There is no charge to apply for child support services. Many services are provided at no cost. Effective October 1, 2011, custodial parents with full-service cases who have never received TANF will pay a \$25 fee each year that they receive at least \$500 in child support collections. Fees will be deducted from child support payments. Parents who have more than one child support case will pay a fee on each case that meets the criteria.

Id.

tion and conservatorship.⁵³ Rights of visitation are primarily the concern of the noncustodial parent because those rights allow the noncustodial parent particular times to see his or her children.⁵⁴ There are two types

53. See TEX. FAM. § 203.004.

(a) A domestic relations office may: (1) collect and disburse child support payments that are ordered by a court to be paid through a domestic relations registry; (2) maintain records of payments and disbursements made under Subdivision (1); (3) file a suit, including a suit to: (A) establish paternity; (B) enforce a court order for child support or for possession of and access to a child; and (C) modify or clarify an existing child support order; (4) provide an informal forum in which alternative dispute resolution is used to resolve disputes under this code; (5) prepare a court-ordered social study under Chapter 107; (6) represent a child as an amicus attorney, an attorney ad litem, or a guardian ad litem in a suit in which: (A) termination of the parent-child relationship is sought; or (B) conservatorship of or access to a child is contested; (7) serve as a friend of the court; (8) provide pre-divorce counseling ordered by a court; (9) provide community supervision services under Chapter 157; (10) provide information to assist a party in understanding, complying with, or enforcing the party's duties and obligations under Subdivision (3); (11) provide, directly or through a contract, visitation services, including supervision of court-ordered visitation, visitation exchange, or other similar services; (12) issue an administrative writ of withholding under Subchapter F, Chapter 158; and (13) provide parenting coordinator services under Chapter 153. (b) A court having jurisdiction in a proceeding under this title, Title 3, or Section 25.05, Penal Code, may order that child support payments be made through a domestic relations office. (c) A domestic relations office may: (1) hire or contract for the services of attorneys to assist the office in providing services under this chapter; and (2) employ community supervision officers or court monitors.

Id.

54. *Id.* § 151.001.

(a) A parent of a child has the following rights and duties: (1) the right to have physical possession, to direct the moral and religious training, and to designate the residence of the child; (2) the duty of care, control, protection, and reasonable discipline of the child; (3) the duty to support the child, including providing the child with clothing, food, shelter, medical and dental care, and education; (4) the duty, except when a guardian of the child's estate has been appointed, to manage the estate of the child, including the right as an agent of the child to act in relation to the child's estate if the child's action is required by a state, the United States, or a foreign government; (5) except as provided by Section 264.0111, the right to the services and earnings of the child; (6) the right to consent to the child's marriage, enlistment in the armed forces of the United States, medical and dental care, and psychiatric, psychological, and surgical treatment; (7) the right to represent the child in legal action and to make other decisions of substantial legal significance concerning the child; (8) the right to receive and give receipt for payments for the support of the child and to hold or disburse funds for the benefit of the child; (9) the right to inherit from and through the child; (10) the right to make decisions concerning the child's education; and (11) any other right or duty existing between a parent and child by virtue of law. (b) The duty of a parent to support his or her child exists while the child is an unemancipated minor and continues as long as the child is fully enrolled in a secondary school in a program leading toward a high school diploma and complies with attendance requirements described by Section 154.002(a)(2). (c) A parent who fails to discharge the duty of support is

of conservatorships that manage the amount of input a parent has in making decisions on behalf of his or her children.⁵⁵ The first type of conservatorship is sole-managing conservatorship, which enables the custodial parent to make decisions regarding the child without consulting the noncustodial parent.⁵⁶ The second type of conservatorship is joint-managing conservatorship, which requires the custodial parent to consult with the non-custodial parent before making decisions about the child.⁵⁷ Title

liable to a person who provides necessities to those to whom support is owed. (d) The rights and duties of a parent are subject to: (1) a court order affecting the rights and duties; (2) an affidavit of relinquishment of parental rights; and (3) an affidavit by the parent designating another person or agency to act as managing conservator. (e) Only the following persons may use corporal punishment for the reasonable discipline of a child: (1) a parent or grandparent of the child; (2) a stepparent of the child who has the duty of control and reasonable discipline of the child; and (3) an individual who is a guardian of the child and who has the duty of control and reasonable discipline of the child.

Id.

55. *Id.* § 153.005.

(a) In a suit, the court may appoint a sole managing conservator or may appoint joint managing conservators. If the parents are or will be separated, the court shall appoint at least one managing conservator. (b) A managing conservator must be a parent, a competent adult, an authorized agency, or a licensed child-placing agency.

Id.

56. *Id.* § 153.132.

Unless limited by court order, a parent appointed as sole managing conservator of a child has the rights and duties provided by Subchapter B and the following exclusive rights: (1) the right to designate the primary residence of the child; (2) the right to consent to medical, dental, and surgical treatment involving invasive procedures; (3) the right to consent to psychiatric and psychological treatment; (4) the right to receive and give receipt for periodic payments for the support of the child and to hold or disburse these funds for the benefit of the child; (5) the right to represent the child in legal action and to make other decisions of substantial legal significance concerning the child; (6) the right to consent to marriage and to enlistment in the armed forces of the United States; (7) the right to make decisions concerning the child's education; (8) the right to the services and earnings of the child; and (9) except when a guardian of the child's estate or a guardian or attorney ad litem has been appointed for the child, the right to act as an agent of the child in relation to the child's estate if the child's action is required by a state, the United States, or a foreign government.

Id.

57. *Id.* § 153.134.

(a) If a written agreed parenting plan is not filed with the court, the court may render an order appointing the parents joint managing conservators only if the appointment is in the best interest of the child, considering the following factors: (1) whether the physical, psychological, or emotional needs and development of the child will benefit from the appointment of joint managing conservators; (2) the ability of the parents to give first priority to the welfare of the child and reach shared decisions in the child's best interest; (3) whether each parent can encourage and accept a positive relationship between the child and the other parent; (4) whether both parents participated in child

IV-D agencies often include provisions that establish conservatorship and visitation rights in the same court that orders child support.⁵⁸ This set-up allows the order to apply to both parties; it orders child support for the children who

live with the custodial parent, and establishes the noncustodial parent's right to see the children and play a role in the decisions regarding the children.⁵⁹

5. Defense of Marriage Act and Its Effect on IV-D Agencies

Since Congress passed the Defense of Marriage Act (DOMA) in 1996, many states have passed their own defense of marriage acts that prohibit same-sex couples from getting married.⁶⁰ Because the states have the ultimate authority to establish the process for collecting child support, the defense of marriage acts in each state have an effect on the other types of services provided. For instance, Texas has a defense of marriage act, and while the IV-D agency does not expressly prohibit child support enforcement services from being provided to same-sex families, its effect inevita-

rearing before the filing of the suit; (5) the geographical proximity of the parents' residences; (6) if the child is 12 years of age or older, the child's preference, if any, regarding the person to have the exclusive right to designate the primary residence of the child; and (7) any other relevant factor. (b) In rendering an order appointing joint managing conservators, the court shall: (1) designate the conservator who has the exclusive right to determine the primary residence of the child and: (A) establish, until modified by further order, a geographic area within which the conservator shall maintain the child's primary residence; or (B) specify that the conservator may determine the child's primary residence without regard to geographic location; (2) specify the rights and duties of each parent regarding the child's physical care, support, and education; (3) include provisions to minimize disruption of the child's education, daily routine, and association with friends; (4) allocate between the parents, independently, jointly, or exclusively, all of the remaining rights and duties of a parent as provided by Chapter 151; and (5) if feasible, recommend that the parties use an alternative dispute resolution method before requesting enforcement or modification of the terms and conditions of the joint conservatorship through litigation, except in an emergency.

Id.

58. TEX. FAM. CODE § 153.005 (2006).

59. *See id.* § 153.193 (stating "[t]he terms of an order that denies possession of a child to a parent or imposes restrictions or limitations on a parent's right to possession of or access to a child may not exceed those that are required to protect the best interest of the child.").

60. 1 U.S.C. § 7 (2006). The Act defines "marriage" and "spouse" as follows:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.

Id.

bly denies them services.⁶¹ The portion of the act that states that any unions other than those of opposite-sex couples are void as against public policy delegitimizes same-sex unions and same-sex marriages from other states.⁶² Regarding these unions as void has the effect of denying parents and children from these unions the same state-run services that children of opposite-sex unions receive.⁶³ In essence, Congress' attempts to advocate for the rights of children and force non-supportive parents to meet their financial obligations has simultaneously denied that same right to equally deserving families.

III. THE CURRENT STATUS OF THE PROBLEM

Currently, there is no state legislation that specifically includes same-sex couples and their children. In addition to excluding same-sex couples from legislation, many state family codes include a provision that explains that the state's laws pertaining to child support will honor all other state laws—including defense of marriage acts.⁶⁴ By including this provision,

61. TEX. FAM. § 6.204. "In this section, 'civil union' means any relationship other than marriage that: (1) is intended as an alternative to marriage or applies primarily to cohabitating persons; and (2) grants to the parties of the relationship legal protections, benefits, or responsibilities granted to the spouses of a marriage." *Id.* The act goes further to explain that "a marriage between person of the same-sex or a civil union is contrary to the public policy of this state and is void in this State". *Id.* Also,

the state or an agency or policy subdivision of the state may not give effect to a: (1) public act, record, or judicial proceeding that creates, recognizes, or validates a marriage between persons of the same sex or a civil union in this state or in any other jurisdiction; or (2) right or claim to any legal protection, benefit, or responsibility asserted as a result of a marriage between persons of the same sex or a civil union in this state or in any other jurisdiction.

Id.

62. *See id.* (denying rights to same-sex couples and refusing to recognize the marriage laws of other states help perpetuate the stigma against same-sex couples and their children).

63. *See id.* (prohibiting state agencies from giving a same-sex couple any right or claim to any legal protection, which would include a lawsuit for conservatorship or child support).

64. *Id.* § 152.303.

(a) A court of this state shall recognize and enforce a child custody determination of a court of another state if the latter court exercised jurisdiction in substantial conformity with this chapter or the determination was made under factual circumstances meeting the jurisdictional standards of this chapter and the determination has not been modified in accordance with this chapter. (b) A court of this state may utilize any remedy available under other law of this state to enforce a child custody determination made by a court of another state. The remedies provided in this subchapter are cumulative and do not affect the availability of other remedies to enforce a child custody determination.

Id.

the state has established the inevitable denial of rights to same-sex couples and their children. The first part of this analysis will explore the current laws in several states and their failure to address the children of same-sex couples. The second part of the analysis will explore possible solutions to the problems outlined in this section.

At this time, children of same-sex couples have some of the same rights that children of heterosexual couples have. For instance, a homosexual parent who has adopted a child of no biological relation to herself possesses the same legal rights to the child as a biological parent.⁶⁵ These legal rights include the right to custody, and the responsibility of the non-custodial parent to provide child support. A two-fold problem arises when the non-biological parent has not formally adopted the child. In this case, the non-biological parent cannot obtain the same rights to ac-

65. *Id.* § 102.003.

(a) An original suit may be filed at any time by: (1) a parent of the child; (2) the child through a representative authorized by the court; (3) a custodian or person having the right of visitation with or access to the child appointed by an order of a court of another state or county; (4) a guardian of the person or of the estate of the child; (5) a governmental entity; (6) an authorized agency; (7) a licensed child placing agency; (8) a man alleging himself to be the father of a child filing in accordance with Chapter 160, subject to the limitations of that chapter, but not otherwise; (9) a person, other than a foster parent, who has had actual care, control, and possession of the child for at least six months ending not more than 90 days preceding the date of the filing of the petition; (10) a person designated as the managing conservator in a revoked or unrevoked affidavit of relinquishment under Chapter 161 or to whom consent to adoption has been given in writing under Chapter 162; (11) a person with whom the child and the child's guardian, managing conservator, or parent have resided for at least six months ending not more than 90 days preceding the date of the filing of the petition if the child's guardian, managing conservator, or parent is deceased at the time of the filing of the petition; (12) a person who is a relative of the child within the third degree by consanguinity, as determined by Chapter 573, Government Code, if the child's parents are deceased at the time of the filing of the petition; or (14) a person who has been named as a prospective adoptive parent of a child by a pregnant woman or the parent of the child, in a verified written statement to confer standing executed under Section 102.0035, regardless of whether the child has been born. (b) In computing the time necessary for standing under Subsections (a)(9), (11), and (12), the court may not require that the time be continuous and uninterrupted by shall consider the child's principal residence during the relevant time preceding the date of commencement of the suit. (c) Notwithstanding the time requirements of Subsection (a)(12), a person who is a foster parent of a child may file suit to adopt a child for whom the person is providing foster care at any time after the person has been approved to adopt the child. The standing to file suit under this subsection applies only to the adoption of a child who is eligible to be adopted.

Id.

cess the child, and the biological partner is unable to establish support for the child.⁶⁶

Unfortunately, due to the uncertainty in this area of law, it is not uncommon for one parent to use legislation like a DOMA against the other parent when litigating these matters.⁶⁷ In this situation, the partner who wishes to deny the other partner visitation would argue that allowing standing to file suit is void as against public policy in the state.⁶⁸ The same argument is used by former partners who are trying to escape from child support obligations.⁶⁹

Another problem that exists exclusively for same-sex is that they have to pay for their legal services.⁷⁰ Title IV-D agencies will intervene in heterosexual disputes to establish child support and conservatorship, while homosexual couples have to pay for private litigation, and outcomes in these private proceedings are both unknown and costly.⁷¹

As a result of legislatures' and courts' failure to recognize changes to the concept of a modern family, innocent children are being neglected. Ideally, once a child is born to a couple, two loving parents surround him. This is as true for same-sex couples as it is for heterosexual couples. Sometimes however, the parents' union does not last, which leaves the child with separated parents. In families where the parents are heterosexual, the law is clear that each parent has an equal right to access the child and has standing to file suit for conservatorship and visitation.⁷² In addition to having standing to file suit for access to the child, the heterosexual custodial parent has equal standing in a court of law to file suit for

66. See TEX. FAM. CODE § 102.003 (2006) (explaining the various ways for a non-biological parent to have standing to sue, which are oftentimes much more difficult to prove.)

67. See *Hobbs v. Van Stavern*, 249 S.W.3d 1, 2–3 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (arguing on one side that the adoptive parent did not have a right to be a joint managing conservator of the child because it was void as against public policy in Texas, but the court did not allow it).

68. *Id.*

69. *In re H.M. v. E.T.*, 930 N.E.2d 206, 207–08 (N.Y. 2010).

70. See *Peebles v. Peebles*, 562 S.W.2d 503, 506 (Tex. App.—San Antonio 1978, no writ) (explaining that in a modification suit for child custody, the wife's attorney spent 82.9 hours on the case and charged \$50.00 per hour, totaling \$4,145.00). That case was over thirty years ago, so a case brought today would cost considerably more because, due to inflation, attorneys now charge more than \$50.00 per hour.

71. *Id.* See generally TEX. FAM. CODE § 231 (2008) (describing the services and objectives of the IV-D program in the Texas Family Code). Since the state of Texas does not recognize same-sex marriages, the provisions of the Texas Family Code do not apply to homosexual couples, forcing them to seek alternative avenues to settle child support issues. *Id.*

72. TEX. FAM. CODE § 102.003 (2006); *Hobbs v. Van Stavern*, 249 S.W.3d 1, 3 (Tex. App.—Houston [1st Dist.] 2006, no pet.).

child support.⁷³ Despite the unfortunate circumstances of a child growing up with separated parents, a child from a heterosexual union is more likely to receive support from both parents because the parents' rights are defined and enforced by state legislatures and courts.

In a family where the parents are of the same-sex, state legislatures and courts do not enforce the same rights and duties.⁷⁴ Parents in these situations suffer, either from raising the child without support from the former partner, or from not having any visitation rights to the child, but the child suffers the ultimate harm by either not having a parent present in their life or not having adequate financial support. In many states, once same-sex parents separate, the child no longer has any support from the non-custodial parent simply because the legislature and courts refuse to enforce this right.

A. U.S. Supreme Court

In *Troxel v. Granville*,⁷⁵ the Supreme Court considered the constitutionality of a Washington statute that permitted any individual to sue for visitation as long as it served the best interest of the child.⁷⁶ The issue at hand was whether the particular statute violated substantive due process.⁷⁷ In this situation, the paternal grandparents of the superior children were awarded visitation against the mother's wishes because the district court deemed the visitation to be in the best interest of the children.⁷⁸ The Supreme Court stated:

[T]he Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a "better" decision could be made. Neither the Washington nonparental visitation statute generally—which places no limits on either the persons who may petition for visitation or the circumstances in which such a petition may be granted—nor the Superior Court in this specific case required anything more.⁷⁹

73. See TEX. FAM. CODE § 154.001 (2006) (describing the general circumstances in which the court adjudicates child support issues).

74. See *White v. White*, 293 S.W.3d 1, 6–7 (Mo. Ct. App. 2009) (refusing to allow noncustodial former partner standing to sue).

75. *Troxel v. Granville*, 530 U.S. 57 (2000).

76. WASH. REV. CODE § 26.10.160(3), *invalidated by* *Troxel v. Granville*, 530 U.S. 57, 61 (2000). The statute permitted "[a]ny person" to petition for visitation rights "at any time" and authorizes state superior courts to grant such rights whenever visitation may serve a child's best interest. *Id.*

77. *Troxel*, 530 U.S. at 65.

78. *Id.* at 61–62.

79. *Id.* at 72–73.

The Court held the statute, as it was applied, was unconstitutional.⁸⁰ This case, while not directly applicable to same-sex unions, indicates the trouble that some legislatures might encounter with broadening the legislation for child support, visitation, and conservatorship.⁸¹ Washington's statute was too broad because the statute lacked specificity about who had standing to sue.⁸² *Troxel* demonstrates that legislatures must be cautious when amending their current parent-child statutes.

B. *Texas*

Texas has a DOMA which states, "a marriage between persons of the same sex or a civil union is contrary to the public policy of this state and is void in this state."⁸³ Section 152.303 of the Texas Family Code discusses child support obligations and states that the guidelines will also abide by all other state laws.⁸⁴ Section 6.204(c) prohibits a political subdivision or state agency from giving any legal protection to claims asserted as a result of same-sex marriage.⁸⁵ By including this provision within the part of the

80. *Id.* at 73.

81. *Id.* "The constitutionality of any standard for awarding visitation turns on the specific manner in which that standard is applied and that the constitutional protections in this area are best 'elaborated with care.'" *Id.* (quoting Justice Kennedy).

82. *Troxel v. Granville*, 530 U.S. 57, 63 (2000).

83. TEX. FAM. CODE § 6.204(b) (2006).

84. TEX. FAM. CODE § 152.303 (2008).

85. TEX. FAM. CODE § 6.204(c) (2006). *See also* *State v. Naylor*, 330 S.W.3d 434, 436 (Tex. App.—Austin 2011, pet. filed) (holding that the State had no standing to appeal). This case involved a lesbian couple who was married in Massachusetts, but moved back to their home state, Texas, and adopted a child. *Id.* Since the couple resided in Texas for almost seven years when they filed for divorce, they filed in a Texas state court. *Id.* A trial court granted the divorce, but the State appealed based on the trial court's lack of subject matter jurisdiction. *Id.* at 437. Specifically, the State argued that granting the divorce was in violation of Section 6.204(c) of the Texas Family Code, which prohibited a "state agency or political subdivision from giving effect to 'right or claim to any legal protection, benefit, or responsibility asserted as a result' of same-sex marriage." *Id.* at 435–36.

The State treats *Naylor's* petition for divorce as an "implied" constitutional attack on section 6.204 of the family code, reasoning that the trial court could not possibly have granted the divorce without determining that section 6.204 is unconstitutional We decline to read an implied constitutional challenge into *Naylor's* petition for divorce where no such challenge has been expressly raised, particularly given the potential for interpreting section 6.204 in a manner that would allow the trial court to grant a divorce in this case. One could argue, for example, that section 6.204 did not prohibit the trial court's actions because divorce is a "benefit" of state residency, rather than a "legal protection, benefit, or responsibility" resulting from marriage. *See id.* One could also argue that under the plain language of section 6.204, the trial court is only prohibited from taking actions that create, recognize, or give effect to same-sex marriages on a "going-forward" basis, so that the granting of a divorce would be permissible. *Naylor* has in fact made both of these arguments, either on appeal or in response

Texas Family Code that pertains to child support, the Texas State Legislature has denied the IV-D services to same-sex couples.⁸⁶ It is important to note that non-biological parents can independently sue for visitation or custody because the state statute outlining standing to file suits affecting the parent-child relationship includes a person who has cared for the child at least six months in the preceding ninety days to filing the suit, or a person who has lived with the child and the child's parent for at least six months in the preceding ninety days if the parent is deceased when the petition is filed.⁸⁷

In *Jones v. Fowler*,⁸⁸ the Texas Supreme Court held that a former partner did not provide care for the child before filing her suit for visitation, and therefore did not meet the statutory requirement.⁸⁹ The Court explained that even though the legislature removed the word "immediately" before "preceding," the statute had the same effect, and it had been too long since the former partner cared for the child for her to have standing to file suit for visitation.⁹⁰ The legislature has since added a provision that requires filing the suit "not more than 90 days" to remove confusion, but the *Jones* opinion demonstrates the higher burden a former partner must meet in order to prove that she had a substantial relationship with the child.⁹¹ It is much easier for a biological parent or an individual claiming to be a biological parent to have standing to sue.⁹²

to the State's post-judgment plea to the jurisdiction. While we express no opinion on the merit of these arguments, the fact remains that there are interpretations of section 6.204 that would allow the trial court to grant the divorce without finding the statute unconstitutional. Furthermore, any such interpretation would have to be entertained before a conclusion of unconstitutionality could be reached.

Id. at 441-42.

86. See *State v. Naylor*, 330 S.W.3d 434, 435 (Tex. App.—Austin 2011, pet. filed) (citing TEX. FAM. CODE § 6.204(c)).

87. TEX. FAM. CODE § 102.003(a)(9) & (11) (West 2006).

88. *Jones v. Fowler*, 969 S. W.2d 429, 429 (Tex. 1998); see Robin Cheryl Miller, *Child Custody and Visitation Rights Arising from Same-sex Relationship*, 80 A.L.R. 5th 1, § 7[a] (originally published in 2000) (analyzing the Court's holding in the case).

89. *Id.* at 433.

90. *Id.* "We conclude that the Legislature did not intend a substantive change when it deleted 'immediately' from 'immediately preceding' in section 102.003(9) of the Family Code. Because *Fowler* does not meet the custody, control, and possession requirements of this section, we hold that she does not have standing to seek visitation rights with the child." *Id.*

91. TEX. FAM. CODE § 102.003(a)(9) (2011). The entire Subsection reads: "a person, other than a foster parent, who has had actual care, control, and possession of the child for at least six months ending not more than 90 days preceding the date of the filing of the petition." *Id.*

92. TEX. FAM. CODE § 102.003(a)(1) (2011).

While the current laws in Texas do not permit IV-D agencies to intervene in child support cases for same-sex couples, there have been some cases in which courts have indicated same-sex parents should have the same rights and responsibilities to their children as opposite-sex parents. In *Hobbs v. Van Stavern*,⁹³ a former partner filed suit to establish herself as a joint managing conservator for the couple's minor child.⁹⁴ Hobbs was the biological mother of the couple's daughter, and Van Stavern had already legally adopted her when the couple separated.⁹⁵ The Court of Appeals in Houston held the adoptive parent had standing to file a Suit Affecting the Parent Child Relationship (SAPCR).⁹⁶ Interestingly, Hobbs asserted that the court could not permit an adoptive parent to file a SAPCR because Texas did not recognize same-sex marriage, and allowing Van Stavern to be a joint-managing conservator would violate public policy.⁹⁷ In her pleading, Hobbs asserted, "entertainment and resolution of [Van Stavern's] SAPCR was in some manner tantamount to a proclamation validating same-sex relationships."⁹⁸ As this case demonstrates, unfortunately, due to various DOMAs enacted by different states, biological parents are able to use these acts as weapons against the other parent in court. The biological parent uses the act to deny the other parent custody and visitation rights, while former partners also use the act to avoid their responsibility to provide child support.

In another case, the Court of Appeals in Houston recognized the determination of child custody by a California court.⁹⁹ In that situation, a same-sex couple had a baby through a surrogate.¹⁰⁰ The California court determined the child's parentage before the baby was born.¹⁰¹ The biologically related partner was listed on the birth certificate as the father, while the non-biological father was listed on the birth certificate as the mother, and the surrogate and her husband had no legal right to the

93. *Hobbs v. Van Stavern*, 249 S.W.3d 1 (Tex. App.—Houston [1st Dist.] 2006, no pet.).

94. *Id.* at 1; see Robin Cheryl Miller, *Child Custody and Visitation Rights Arising from Same-sex Relationship*, 80 A.L.R. 5th 1, § 6[c] (originally published in 2000) (explaining the court's decision).

95. *Hobbs*, 249 S.W.3d at 2.

96. *Id.* at 1.

97. *Id.* at 5.

98. *Id.*

99. *Bergick v. Wagner*, 336 S.W.3d 805, 807 (Tex. App.—Houston [1st Dist.] 2011, no pet.). The parties petitioned the California court for an order decreeing that they were the legal parents of the child and that the surrogate was not the legal mother. *Id.* The order was subsequently granted. *Id.*

100. *Id.*

101. *Id.*

child.¹⁰² The couple then moved to Texas and ultimately separated.¹⁰³ The Court of Appeals had to determine if Texas could recognize the California court's determination when the decision was rendered before the child was born.¹⁰⁴ The Court held that the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) provided that the state of Texas must enforce the laws of another state.¹⁰⁵

These cases show some Texas courts' willingness to recognize rights for same-sex parents and their children, but the legislature has yet to take a stance that would permit the IV-D agency to serve children of same-sex unions. By denying them this service, children are left without financial support or access to the other parent; often the only remedy for families in this situation is private litigation, which due to the cost, many families might avoid. Despite the recent Texas court decisions demonstrating a more broadened view of the modern family, other states with DOMAS have not followed suit.

C. *Missouri*

In *White v. White*,¹⁰⁶ a Missouri Court of Appeals held that a former partner did not have standing to sue in order to establish a mother-child relationship with her partner's biological child, and that she did not prove

102. *Id.* at 808.

103. *Id.*

104. *Id.* at 809. To make this determination, the court first interpreted the UCCJEA "to determine if the California judgment qualifie[d] as a child custody determination." *Id.* The court then decided whether "California lacked jurisdiction to enter such a judgment before C.B.W. was born." *Id.*

105. *Bergick v. Wagner*, 336 S.W.3d 805, 816 (Tex. App.—Houston [1st Dist.] 2011, no pet.).

By statute, Texas law permits registration of a foreign custody order if the foreign state (1) 'exercised jurisdiction under statutory provisions substantially in accordance' with the UCCJEA or (2) the 'factual circumstances' meet the UCCJEA's jurisdictional standards. TEX. FAM.CODE ANN. § 152.303(a) (Vernon 2008). Thus, if a UCCJEA judgment is signed as to an unborn child and the circumstances are such upon the child's birth that the court has sufficient jurisdictional ties, then recognizing that judgment as a child custody determination for registration purposes is proper, as the trial court found. Here, the California court entered judgment before C.B.W. was born, but under California law, that order was stayed until his birth. Jurisdiction attached upon the child's birth in California. Berwick has not argued that California jurisdiction was not proper immediately upon C.B.W.'s birth, and no other state was competing for jurisdiction over C.B.W. at that point. We hold, on these facts, that the California court's judgment was a proper exercise of its jurisdiction under California law.

Id.

106. *White v. White*, 293 S.W.3d 1, 1 (Mo. Ct. App. 2009).

a claim for breach of contract for child support obligations.¹⁰⁷ In this case, both lesbian partners had children through artificial insemination before ending their relationship.¹⁰⁸ The former partner sued the biological mother to establish a parent-child relationship with the child she was not biologically related to, and to obtain child support from her former partner for her biological child.¹⁰⁹ The court denied all of her claims against her former partner for child support.¹¹⁰ The suing partner attempted to argue that although there was no statute that expressly gave her standing, she was nonetheless an “interested party”¹¹¹ and thus, the court had jurisdiction.¹¹² The suing partner also argued that the common law doctrine of exceptional circumstances applied.¹¹³ The court stated that when applying statutory analysis to the suing partner’s claims, a gender-neutral reading of the statute required them to “insert the word ‘mother’ for ‘father’ in all instances.”¹¹⁴ The statute then read, “[an] action to determine the existence of the [mother] and child relationship with respect to a child who has no presumed [mother] . . . may be brought by the specified individuals.”¹¹⁵ This substitution allowed the court to deny standing to the former partner because in this situation, the child had a “presumed mother.”¹¹⁶ This case illustrates the court’s reluctance to include alternative definitions into the existing exclusionary statutes.

D. New York

New York recently became one of the few states that recognizes same-sex marriage, by enacting the Marriage Equality Act during the summer of 2011.¹¹⁷ Like Texas, the New York Family Court Act contains a provi-

107. *Id.*

108. *Id.* at 6. Both partners used the same anonymous sperm donor. *Id.*

109. *Id.* The former partner based her claims on the fact that neither child had a natural or presumed father and the idea that both women made a joint decision to conceive the children. *Id.*

110. *Id.* at 7.

111. *Id.* at 9–10. The former partner based her claim on MoUPA § 210.848, which provides “[A]ny interested party may bring an action to determine the existence or nonexistence of a mother and child relationship.” *Id.* She claimed that she functioned as C.E.W.’s mother since the time of birth. *Id.*

112. *White v. White*, 293 S.W.3d 1, 9–10 (Mo. Ct. App. 2009).

113. *Id.* at 17. The former partner argued that the MoUPA supplements common law and allows the court to protect a child’s best interest by exercising its *parens patriae* authority. *Id.* at 3.

114. *Id.* at 9.

115. *Id.*

116. *Id.*

117. See N.Y. DOM. REL. LAW § 10(a) (Consol. 2011) (stating that “[a] marriage that is otherwise valid shall be valid regardless of whether the parties to the marriage are of the same or different sex.”).

sion that addresses child support.¹¹⁸ It states that the tribunal of the state should apply the substantive and procedural laws of the state.¹¹⁹ While both Texas and New York have the same provision regarding the application of the laws of the state, because New York no longer has a defense of marriage act,¹²⁰ it permits agency services to same-sex couples.¹²¹ Also, according to state law, in order for a couple to petition to establish a support order, the responding tribunal may issue an order if the person responding has been determined to be the parent pursuant to state law.¹²² The easiest way to fulfill this requirement is for the non-biological parent adopt the child and be listed on the birth certificate.¹²³ Section 580-401 also permits an establishment order if “there is other clear and convincing evidence that the respondent is the child’s parent.”¹²⁴ In comparing the laws in Texas with the laws in New York, the New York laws are more lenient in terms of establishing child support orders for children of same-sex couples.

The issue of child support in New York has been recently addressed in several cases. Before New York recognized same-sex marriage in 2011, courts were beginning to recognize the responsibility that same-sex couples have to their children. In *H.M. v. E.T.*, the court recognized that family courts have jurisdiction over the adjudication of a biological mother’s petition for child support.¹²⁵ In that case, the non-biological parent tried to avoid paying child support.¹²⁶ The court, however, found that the same duty to support children exists in homosexual relationships as in heterosexual relationships.¹²⁷ In a concurring opinion, Judge Smith argued that the decision in *In re Custody of H.S.H.-K* permitted the establishment of a ‘parent-like relationship’ with proof of four elements, though he felt that these particular elements would result in endless litigation.¹²⁸ Some of the elements included: “‘significant responsibility for

118. See N.Y. DOM. REL. LAW § 580-303 (Consol. 1999) (allowing petitions to establish child support orders); N.Y. DOM. REL. LAW ch. 95, § 10 (a) (Consol. 2011).

119. N.Y. DOM. REL. LAW § 580-303 (Consol. 1999).

120. N.Y. DOM. REL. LAW § 10(a) (2011).

121. See N.Y. DOM. REL. LAW § 580-401 (Consol. 1999) (allowing petitions to establish child support orders).

122. N.Y. DOM. REL. LAW § 580-401(b)(2) (Consol. 1999).

123. See N.Y. DOM. REL. LAW § 580-401(b)(3) (Consol. 1999) (requiring the respondent to provide clear and convincing evidence).

124. N.Y. DOM. REL. LAW § 580-401(b)(3) (Consol. 1999).

125. *H.M. v. E.T.*, 930 N.E.2d 206, 209 (N.Y. 2010).

126. *Id.* at 208.

127. *Id.* at 209.

128. *Id.* at 210. (Smith, J. concurring) (quoting *In re Custody of H.S.H.-K.* 533 N.W.2d 419, 421 (1995)).

the child's care, education and development' and a 'bonded, dependent relationship with the child.'"¹²⁹

While the courts in New York specifically stated that parents in same-sex unions have the same rights to and responsibilities for their children as their heterosexual counterparts, the legislature, while recognizing same-sex marriage, has been unable to open the door to IV-D agencies to assist in advocating on behalf of the children of same-sex unions because of the federal statute that guides the IV-D agencies.¹³⁰ Even though states have not specifically stated that IV-D agencies must serve children from same-sex unions, the decisions from the New York court have moved one step closer to equalizing state support.

E. California

In 2005, a California Supreme Court case made headlines when the Court ruled that both partners in same-sex relationships had the same legal obligation to their children.¹³¹ *Elisa B. v. Superior Court of El Dorado County* involved a lesbian couple where both partners were artificially inseminated.¹³² One of the partners had twins and the other partner had a son.¹³³ One of the twins had a congenital heart defect, Down syndrome, and required medical treatment.¹³⁴ When the couple separated, the partner who had been the main financial supporter of the family advised her former partner that she could no longer support the twins, leaving them without any support.¹³⁵ The twins' mother sued her former partner for child support.¹³⁶ The attorney representing the opposing partner argued that the California legislature did not intend to stretch the concept of a family unit to same-sex unions because the legislature did not define it as such.¹³⁷

129. *Id.*

130. See Office of Temporary Disability Assistance, *Division of Child Support Enforcement, Noncustodial Parent Information*, (2011), http://www.childsupport.ny.gov/dcse/non_custodial_parent_info.html#apply (using language only directed toward "fathers").

131. Richard Gonzales, *Court: Same-Sex Couples Must Provide Child Support*, N.A.T'L PUB. RADIO, (Aug. 23, 2005), www.npr.org/templates/story/story.php?storyId=4811333.

132. *Elisa B. v. Superior Court of El Dorado Cnty.*, 117 P.3d 660, 663 (Cal. 2005).

133. *Id.*

134. *Id.*

135. *Id.* at 664.

136. *Id.* at 662–63.

137. *Id.* at 664; see also Michael J. Ritter, *Perry v. Schwarzenegger: Trying Same-Sex Marriage*, 13 SCHOLAR 363, 366 n.12 (2010) (analyzing the decision of *Perry v. Schwarzenegger* and describing California's controversial history with same-sex marriage).

California voters adopted the California Defense of Marriage Act, also known as Proposition 22, in November 2000. Proposition 22 amended the California Family Code to require marriage be only between a man and a woman. CAL. FAM. CODE § 308.5

The California Supreme Court did not agree with the lower court's argument; instead, it held that when a couple agrees to have children through artificial insemination, they are legally bound to support those children.¹³⁸ The Court pointed out that it had previously required a non-biological father to provide support for children from a relationship because he held the children out to be his own.¹³⁹ The statutes, at the time of *Elisa B.*, as applied by the California Supreme Court, provided for a more liberal interpretation of a family unit.¹⁴⁰ When the case was before the Court, the state recognized domestic partnerships, and the statute read, "[t]he rights and obligations of registered domestic partners with respect to a child of either of them shall be the same as those of spouses."¹⁴¹

(Deering 2006), invalidated by *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010). The City of San Francisco and other parties filed actions in state court challenging Proposition 22 as violating the equal protection rights of same-sex couples. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010)). *Id.* In May 2008, Proposition 22 was overturned, allowing the issuance of marriage licenses to same-sex couples until the passage of Proposition 8.

Id.

138. *Elisa B.*, 117 P.3d at 665.

139. *Id.* at 664.

140. CAL. FAM. CODE § 297.5 (2006).

141. *Id.*

(a) Registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses. (b) Former registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon former spouses. (c) A surviving registered domestic partner, following the death of the other partner, shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon a widow or a widower. (d) The rights and obligations of registered domestic partners with respect to a child of either of them shall be the same as those of spouses. The rights and obligations of former or surviving registered domestic partners with respect to a child of either of them shall be the same as those of former or surviving spouses. (e) To the extent that provisions of California law adopt, refer to, or rely upon, provisions of federal law in a way that otherwise would cause registered domestic partners to be treated differently than spouses, registered domestic partners shall be treated by California law as if federal law recognized a domestic partnership in the same manner as California law. (f) Registered domestic partners shall have the same rights regarding nondiscrimination as those provided to spouses. (g) No public agency in this state may discriminate against any person or couple on the ground that the person is a registered domestic partner

The Court also had to determine whether it should view the second mother as another mother or a father.¹⁴² The definition of “mother” states: “[t]he parent and child relationship may be established . . . (a) [b]etween a child and the natural mother . . . by proof of her having given birth to the child.”¹⁴³ The description of “father” is broader: “[a] man is presumed to be the natural father of a child” . . . if he is the husband of the child’s mother, is not impotent or sterile, and was cohabitating with her; . . . if he signs a voluntary declaration of paternity stating he is the ‘biological father of the child’ . . . and if [h]e receives the child into his home and openly holds out the child as his natural child.”¹⁴⁴

While the Court neglected to hold that the two women were both mothers under the definition of “mother” in the California statute, it found that there was “no reason why both parents of a child cannot be women.”¹⁴⁵ Interestingly, the Attorney General appeared pursuant to Section 17406 of the California Family Code to “represent the public in-

rather than a spouse or that the couple are registered domestic partners rather than spouses, except that nothing in this section applies to modify eligibility for long-term care plans pursuant to Chapter 15 (commencing with Section 21660) of Part 3 of Division 5 of Title 2 of the Government Code. (h) This act does not preclude any state or local agency from exercising its regulatory authority to implement statutes providing rights to, or imposing responsibilities upon, domestic partners. (i) This section does not amend or modify any provision of the California Constitution or any provision of any statute that was adopted by initiative. (j) Where necessary to implement the rights of registered domestic partners under this act, gender-specific terms referring to spouses shall be construed to include domestic partners. (k)(1) For purposes of the statutes, administrative regulations, court rules, government policies, common law, and any other provision or source of law governing the rights, protections, and benefits, and the responsibilities, obligations, and duties of registered domestic partners in this state, as effectuated by this section, with respect to community property, mutual responsibility for debts to third parties, the right in particular circumstances of either partner to seek financial support from the other following the dissolution of the partnership, and other rights and duties as between the partners concerning ownership of property, any reference to the date of a marriage shall be deemed to refer to the date of registration of a domestic partnership with the state. (2) Notwithstanding paragraph (1), for domestic partnerships registered with the state before January 1, 2005, an agreement between the domestic partners that the partners intend to be governed by the requirements set forth in Sections 1600 to 1620, inclusive, and which complies with those sections, except for the agreement’s effective date, shall be enforceable as provided by Sections 1600 to 1620, inclusive, if that agreement was fully executed and in force as of June 30, 2005.

Id.

142. *Elisa B.*, 117 P.3d at 664–65.

143. *Id.* at 664.

144. *Id.*

145. *Id.* at 666. The court explained, “our decision in *Johnson* does not preclude a child from having two parents both of whom are women and that no reason appears that a child’s two parents cannot both be women.” *Id.*

terest in establishing, modifying, and enforcing support obligations.”¹⁴⁶ The struggle between the California legislature and the courts over the issue of same-sex marriage from Proposition 22¹⁴⁷ to Proposition 8¹⁴⁸ might have something to do with the Court’s willingness to extend the statutes’ applicability to non-traditional families involving children of same-sex unions.¹⁴⁹

F. *Montana*

In the case of *In re L.F.A.*, the biological mother of three children tried to prevent the Montana Supreme Court from imposing a shared parenting plan because the state did not have a domestic partner statute like California, as applied in the case of *Elisa B. v. Superior Court*.¹⁵⁰ In this case, the couple had been together for twelve years and, during the course of their relationship, they had three children.¹⁵¹ When the couple ended their relationship, the children’s biological mother sought to move the children, but the other partner sought to implement a shared parenting plan.¹⁵²

The Court looked to the state statutes that involved a nonparent claiming a child-parent relationship.¹⁵³ The Court stated, “[t]he Montana Legislature also has provided that a parent’s constitutionally-protected interest in parental control of a child shall yield to the best interest of the child when the parent’s conduct is contrary to the child-parent relationship.”¹⁵⁴ The district court found that the partner who was not biologically related to the children fulfilled the statute’s requirements and that she had established a child-parent relationship with all three of the children.¹⁵⁵ There was evidence that “established [she was the] primary care-

146. *Id.* at 665.

147. CAL. FAM. CODE § 308.5 (Deering 2006), *invalidated* by *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

148. CAL. CONST. ART. I, § 7.5 (2008) (*held unconstitutional* by *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012)).

149. Geoffrey A. Fowler, *Judges Grill Attorneys on Same-Sex Marriage Ban*, WALL ST. J., (Dec. 7, 2010), http://online.wsj.com/article/SB10001424052748703471904576003931792982082.html?mod=googlenews_wsj.

150. *In re L.F.A.*, 220 P.3d 391, 394 (Mont. 2009).

151. *Id.* at 392. Both women raised the children from the times of their births and “were involved in every aspect of caring for the children.” *Id.*

152. *Id.*

153. *Id.* at 394.

154. *Id.*

155. *Id.* “The court found ‘[t]here is no dispute that Filpula [non-biological parent] was involved in every aspect of caring and providing for these children.’” *Id.* Furthermore, the child-parent relationship

taker of each of the three children since their births.”¹⁵⁶ The Court further held that the statute did not require it to find that the biological mother was unfit.¹⁵⁷ The Court explained that the 1999 Montana Legislature “amended the law to recognize specifically a child’s constitutional rights in non-parental parenting proceedings.”¹⁵⁸ Despite the fact that the Montana State Legislature has not been supportive of same-sex marriage and children from homosexual unions in the past, this ruling indicates the Court’s willingness to hear the cause.

In an earlier case, the Court distinguished non-biological parents seeking custody as opposed to just a parental interest.¹⁵⁹ In *Kulstad v. Maniaci*,¹⁶⁰ only one of the partners of a same-sex union adopted the children, and the partner who did not adopt the children filed suit claiming a parental interest.¹⁶¹ The children’s adoptive mother claimed that the Montana statute¹⁶² “improperly fails to require a court to determine

arose as a result of a joint decision by [the non-biological parent] and [the biological parent]. The court found Ankney [the biological parent] voluntarily permitted the children to remain continuously in the care of Filpula [the non-biological parent] for a significant period of time so that Filpula [the non-biological parent] stood and stands in *loco parentis* to the children.

Id. at 395.

156. *In re L.F.A.*, 220 P.3d 391, 394 (Mont. 2009).

157. *Id.*

158. *Id.* at 393.

159. *See Kulstad v. Maniaci*, 220 P.3d 595 (Mont. 2009) (occurring just one month prior to *In re L.F.A.*). The Court explained that custody is where the parent is seeking custodianship of the child, whereas a parental interest is where the parent is seeking other rights to the child, such as visitation rights. *Id.* at 527.

160. *Id.* at 599. The couple’s lawyer “advised them that Montana law allowed only one of them to adopt L.M. [the child].” *Id.* at 597. While the couple agreed to engage in equal parenting, they decided the child would only refer to one of them as “mom,” and the child would not have a hyphenated last name. *Id.*

161. *Id.* at 597, 599.

162. MONT. CODE ANN. § 40-4-228 (2009). The Code states:

(1) In cases when a nonparent seeks a parental interest in a child under 40-4-211 or visitation with a child, the provisions of this chapter apply unless a separate action is pending under Title 41, chapter 3. (2) A court may award a parental interest to a person other than a natural parent when it is shown by clear and convincing evidence that: (a) the natural parent has engaged in conduct that is contrary to the child-parent relationship; and (b) the nonparent has established with the child a child-parent relationship, as defined in 40-4-211, and it is in the best interests of the child to continue that relationship. (3) For the purposes of an award of visitation rights under this section, a court may order visitation based on the best interests of the child. (4) For the purposes of this section, voluntarily permitting a child to remain continuously in the care of others for a significant period of time so that the others stand in *loco parentis* to the child is conduct that is contrary to the parent-child relationship. (5) It is not necessary for the court to find a natural parent unfit before awarding a parental interest to a third party under this section. (6) If the parent receives military service orders

the 'fitness' of a natural parent before awarding a nonparent a parental interest based upon the best interests of the child."¹⁶³ The Court explained that it was not improper, as the non-adoptive parent had proven that she had established a parent-child relationship with the children.¹⁶⁴ This case is another example of the Court's willingness to interpret statutes in favor of supporting the best interest of the child. As this case demonstrates, once a parent-child relationship has developed, it is in the best interest of the child to allow that relationship to continue.

G. Wisconsin

Some courts have viewed the non-biological former partner as a third party and thus forced the former partner to meet a higher burden of proof to establish standing.¹⁶⁵ The Wisconsin Supreme Court explained that in custody disputes between natural parents and third parties, it is necessary to prove that the natural parent is unfit to some degree.¹⁶⁶ The Court pointed out that the term "parent" did not include a same-sex partner and held that the *in loco parentis* approach did not apply to custody

that involve moving a substantial distance from the parent's residence or otherwise have a material effect on the parent's ability to parent the child for the period the parent is called to military services, as defined in 10-1-1003, the court may grant visitation rights to a family member of the parent with a close and substantial relationship to the minor child during the parent's absence if granting visitation rights is in the best interests of the child as determined by 40-4-212.

Id.

163. *Kulstad*, 220 P.3d at 603. "Maniaci [the adoptive mother] further argues that her adopted children have no constitutionally protected rights, absent a showing of abuse, neglect, or dependency." *Id.*

164. *Id.* at 609. "The court acknowledged that the adoption allowed Maniaci [the adoptive mother] to be the exclusive legal parent. The court recognized, however, that Maniaci's [the adoptive mother] actions from the time that the children entered the home had been entirely inconsistent with an exclusive parent-child relationship." *Id.* For example, the adoptive mother allowed the non-adoptive mother to act "in a parental role for a length of time sufficient to establish a bonded, dependent relationship with the minor children." *Id.* Furthermore, the non-adoptive mother "functioned in a parental role from the first day that each of the minor children came to the parties through the end of the parties' relationship." *Id.*

165. *See In re H.S.H.-K.*, 533 N.W.2d 419, 423 (Wis. 1995) (making the non-parent prove that the biological parent is unfit in order to have standing in custody disputes); *see also* Robin Cheryl Miller, *Child Custody and Visitation Rights Arising from Same-sex Relationship*, 80 A.L.R. 5th 1, § 3[b] (originally published in 2000) (explaining the court's decision in the case and how they stated that the mother was not estopped from denying her former partner visitation).

166. *In re H.S.H.-K.*, 533 N.W.2d at 423. "The court has equated the showing required to prove that a parent is 'unfit or unable to care for the child' with the showing required of persons petitioning for the termination of parental rights." *Id.*

actions, thereby leaving the former partner without any right to visitation.¹⁶⁷

The Court stated that it has the power to consider the non-biological parent of same-sex unions as a parent-like figure.¹⁶⁸ It also explained that it was not against public policy to enforce co-parenting agreements between a third party and a natural parent.¹⁶⁹ This Court ultimately held that it could apply equitable powers to award visitation even though state statutes did not expressly provide for it.¹⁷⁰ While this holding improves the likelihood that a non-biological parent could obtain court-ordered visitation, the non-biological parent is still required to meet a heavy burden of proof.

H. Ohio

Similarly, in *Liston v. Pyles*,¹⁷¹ an Ohio Court of Appeals held that since the child was not a product of a state-recognized marriage,¹⁷² the

167. *Id.* at 419.

168. *Id.* at 435. The petitioner must have a “parent-like relationship with the child and that a significant triggering event justifies state intervention in the child’s relationship with a biological or adoptive parent.” *Id.*

169. *Id.* at 434 (overruling contrary language in *In re Z.J.H.*). See *In re Z.J.H.*, 471 N.W.2d, 211 (determining that the visitation statute barred any visitation contract).

170. *In re H.S.H.-K.*, 533 N.W.2d at 437. The court determined that “[i]t is reasonable to infer that the legislature did not intend the visitation statutes to bar the courts from exercising their equitable power to order visitation in circumstances not included within the statutes but in conformity with the policy directions set forth in the statutes . . .” *Id.* at 431. By exercising its equitable powers, courts protect “parental autonomy and constitutional rights by requiring that the parent-like relationship develop only with the consent and assistance of the biological or adoptive parent. It also protects a child’s best interest by preserving the child’s relationship with an adult who has been like a parent.” *Id.* at 436.

171. See generally *Liston v. Pyles*, No. 97APF01-137, 1997 WL 467327 *3 (Ohio Ct. App. 1997); see also Robin Cheryl Miller, *Child Custody and Visitation Rights Arising from Same-sex Relationship*, 80 A.L.R. 5th 1, § 7[a] (originally published in 2000) (analyzing the court’s decision in the case and its application of the equitable doctrines).

172. OHIO CONST. ART. XV, § 11, *invalidated by Phelps v. Johnson*, No. DV05 305642, 2005 WL 4651081 (Ohio Misc. 2005).

Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.
Id. *Phelps v. Johnson*, No. DV05 305642, 2005 WL 4651081 (Ohio Misc. 2005).

The second sentence of Article XV, Sec. 11 of the Ohio Constitution is hereby found to violate the Fourteenth Amendment to the United States Constitution (Equal Protections Clause) . . . This Court finds that the second sentence of Article XV, Sec 11 of the Ohio Constitution is in violation of the Equal Protections Clause of the United States Constitution because the differentiation between the protections provide married victims of domestic violence, vis-à-vis unmarried victims, bears no rational rela-

statute concerning shared parenting plans did not apply. As a result of this, the court denied the former partner any right to the child including visitation rights.¹⁷³ The couple lived together for sixteen years before they decided they wanted a child.¹⁷⁴ Once they had the child, both partners cared for the child equally for three years, after which they eventually separated.¹⁷⁵ The non-biological partner sought visitation, but was denied by the magistrate judge.¹⁷⁶ The biological parent sought child support from her former partner.¹⁷⁷ On appeal, the court held that the "appellant was not a 'parent' as defined by the Ohio Revised Code, and she therefore had no obligation to pay child support."¹⁷⁸ Additionally, the court stated "an underlying proceeding such as a child support proceeding, must be properly pending in order to consider a visitation request."¹⁷⁹ The Court of Appeals upheld the trial court's decision due to the Ohio statutory limitations.¹⁸⁰

The statute described child support as being pertinent "in a divorce, dissolution of marriage, legal separation, or child support proceeding . . ." and allowed the court to " . . . order either or both parents to support or help support their children."¹⁸¹ A legal relationship between a parent and child means "the legal relationship that exists between a child and the child's natural or adoptive parents and upon which those sections and any other provision of the Ohio Revised Code confer or impose rights, privileges, duties, and obligations."¹⁸² In applying this statute, the court denied that the former partner had standing to bring a suit for child support because she was not the biological or the adoptive parent of the child.¹⁸³ Lastly, the court overruled her appeal concerning visitation because the court applied the statute¹⁸⁴ that only allowed for a visitation

tionship to a legitimate state interest, and the classifications drawn in the second sentence of Article XV, Sec. 11 are not reasonable in light of its purpose.

173. Liston, No. 97APF01-137 at *4.

174. *Id.* at *1.

175. *Id.*

176. *Id.*

177. *Id.*

178. Liston v. Pyles, No. 97APF01-137, 1997 WL 467327 *1 (Ohio Ct. App. 1997)

179. *Id.*

180. *Id.* at *3.

181. *Id.* at *2.

182. *Id.*

183. *Id.* at *4.

184. OHIO REV. CODE ANN. § 3109.051(B)(1) (West 2006).

In a divorce, dissolution of marriage, legal separation, annulment, or child support proceeding that involves a child, the court may grant reasonable companionship or visitation rights to any grandparent, any person related to the child by consanguinity or affinity, or any other person other than a parent, if all of the following apply: (a) The grandparent, relative, or other person files a motion with the court seeking com-

suit in cases in which the parties were divorcing or legally separating.¹⁸⁵ The last statute the court applied described who had standing when the biological mother was not married.¹⁸⁶ The statute states:

If a child is born to an unmarried woman, the parents of the woman and any relative of the woman may file a complaint requesting the court of common pleas of the county in which the child resides to grant them reasonable companionship or visitation rights with the child. If the father of the child has acknowledged the child pursuant to Section 2105.18 of the Revised Code or has been determined in an action, to be the father of the child, the father, the parents of the father, and any relative of the father may file a complaint requesting the court of common pleas of the county in which the child resides to grant them reasonable companionship or visitation rights with respect to the child.¹⁸⁷

This case demonstrates the state statutes' narrow scope and the resulting restrictive court interpretations. The outcome in Ohio is extremely different than the outcomes in California and New York due to the court's narrow interpretation.¹⁸⁸ Interestingly, California and New York are states that have, at times, recognized same-sex marriage, whereas Ohio has never exhibited the same willingness to consider a modern interpretation of family, which is reflected in the court's opinion.

Contrast the finding in *Liston* with the finding in *Waszkowski*, where another Ohio Court of Appeals held that a non-biological father, who was romantically involved with the natural mother when she gave birth to the child, had standing to file for visitation even though he was not the biological father.¹⁸⁹ The outcome here is very different, yet the scenario is virtually the same with the only difference being the sexuality of the parents. The *Waszkowski* court was receptive to modern families in allowing a heterosexual former partner to have access to a child he supported and loved, whereas the *Liston* court was not willing to allow a

panionship or visitation rights. (b) The court determines that the grandparent, relative, or other person has an interest in the welfare of the child. (c) The court determines that the granting of the companionship or visitation rights is in the best interest of the child.

Id.

185. *Liston*, No. 97APF01-137 at *6.

186. *Id.* at *4.

187. *Id.*

188. *Cf. id.* (holding that the state's shared parenting statute did not apply to same-sex couples), *with* *Elisa B. v. Superior Court of El Dorado Cnty*, 117 P.3d 660 (Cal. 2005) (holding that same-sex couples have the same rights and duties to their children).

189. *Waszkowski v. Lyons*, No. 2008-L-007, 2009 WL 224540, at *4 (Ohio App. 2009).

same-sex former partner the same standing.¹⁹⁰ The opinions in Wisconsin and Ohio indicate that there are still some states where the judiciary is not receptive to the idea of considering what is in the best interest of the child.

Inevitably, the differences between states that recognize same-sex marriage and those that have defense of marriage acts negatively affect children of and parents in same-sex unions. Therefore, state legislatures should repeal their defense of marriage acts in order to avoid perpetuation of inequality and denial of services to these families. State legislatures still have a long way to go before they are fully supportive of same-sex couples and their children. In order for IV-D agencies to provide assistance it will likely take a federal amendment since most states independently have been slow to repeal their defense of marriage acts.

IV. SOLUTIONS TO THE CURRENT PROBLEM

A. *Short-term Solutions*

In many states, some court remedies are available to former spouses who are either trying to obtain court-ordered visitation with a child they helped raise, or for the custodial parent trying to obtain child support from a former partner. For instance, a former partner can use an equitable doctrine in order to obtain standing to file suit.¹⁹¹ An example of this is when a former partner who is acting as the custodial parent tries to use

190. *Id.*

The dissent's reliance on the case of *Liston v. Pyles* . . . does not alter the outcome. In *Liston*, the court held that a claim for visitation could not be maintained when the underlying support claim was not "proper." That case is distinguishable. *Liston* involved a dispute between two homosexual partners. When the partners separated, the one partner filed a complaint for support and visitation against the other, deemed the 'biological' parent. The court dismissed the underlying support complaint on the grounds that the appellee did not have standing to initiate a complaint for support, not being the child's adoptive or biological parent. In the present case, Mason's biological mother initiated legal proceedings by seeking support. In contrast to *Liston*, the underlying action the present case was properly initiated. Brian's claim for visitation should not be dismissed simply because the underlying support action failed.

Id.

191. *In re T.L.*, No. 953-2340, 1996 WL 393521, at *3 (MoCir. Ct. 1996). The court notably stated that they "will not avoid its constitutional duty to the minor child by bowing to the hypothetical effects of prejudice, *i.e.*, to refuse children of [same-sex] parents, as a class, the rights and protection afforded children of heterosexual parents is, in the opinion of the Court, violative of the Equal Protection Clause." *Id.* at 4. See also Robin Cheryl Miller, *Child Custody and Visitation Rights Arising from Same-sex Relationship*, 80 A.L.R. 5th 1, § 3[b] (originally published in 2000) (outlining the cases where courts view former partner as a third party).

breach of contract principals to obtain child support in cases where the former partner did not formally adopt the child.

Some states have recognized various equitable doctrines for former partners of the biological parents.¹⁹² The most successful of these doctrines are the de facto, psychological, or equitable parent doctrines.¹⁹³ A California Appellate Court found that a former partner was a de facto parent because she “along with her then ‘partner,’ had raised the minor as her own child virtually from birth.”¹⁹⁴ The court went on further to say that it did not affect her de facto standing that the former partner was not acting in the same capacity at the time she filed suit.¹⁹⁵ The Supreme Judicial Court of Massachusetts also found that the former partner was a de facto parent, which allowed the court to have equity jurisdiction to permit visitation despite the mother’s desire to prevent all visitation.¹⁹⁶

The Supreme Court of New Jersey held in *V.C. v. M.J.B.*, that the former partner had standing to sue, and that partner was the child’s “psychological parent.”¹⁹⁷ During the trial, both parties provided psychologists who spoke to the effect of not having the former partner in the child’s life, where the former partner had acted as a “co-parent” by taking on as much responsibility as the biological mother.¹⁹⁸ One psychologist stated, “that the children would benefit from continued contact with V.C. because they had a bonded relationship with her” and if the children felt abandoned by V.C., they might also feel unnecessary guilt and assume that they made V.C. angry or somehow caused the parties’ separation.”¹⁹⁹ The Court further stated that the partner in this case was either

192. *In re T.L.*, No. 953-2340 at *5; see also Robin Cheryl Miller, *Child Custody and Visitation Rights Arising from Same-sex Relationship*, 80 A.L.R. 5th 1, § 3[b] (originally published in 2000) (explaining the court’s use of the equitable parent doctrine).

193. See Robin Cheryl Miller, *Child Custody and Visitation Rights Arising from Same-sex Relationship*, 80 A.L.R. 5th 1, § 2[b] (originally published in 2000) (reiterating the success that parties have had using these doctrines).

194. *In re Hiren C.*, 18 Ca. App. 4th 504, 514 (1st Dist. 1993); see Robin Cheryl Miller, *Child Custody and Visitation Rights Arising from Same-sex Relationship*, 80 A.L.R. 5th 1, § 7[a] (originally published in 2000) (explaining the court’s application of the de facto parent doctrine).

195. *In re Hiren C.*, 18 Ca. App. 4th at 514.

196. *E.N.O. v. L.M.M.*, 711 N.E.2d 886 (Mass. 1999); see Robin Cheryl Miller, *Child Custody and Visitation Rights Arising from Same-sex Relationship*, 80 A.L.R. 5th 1, § 7[a] (originally published in 2000) (stating that the couple had a co-parenting agreement).

197. *V.C. v. M.J.B.*, 748 A.2d 539, 539 (N.J. 2000); see Robin Cheryl Miller, *Child Custody and Visitation Rights Arising from Same-sex Relationship*, 80 A.L.R. 5th 1, § 7[a] (originally published in 2000) (analyzing the Court’s opinion as classifying the non-biological parent as the statutory parent).

198. *V.C.*, 748 A.2d at 544-45.

199. *Id.* at 544.

a “psychological parent” or de facto parent and that this status would grant her standing to sue for visitation in this case.²⁰⁰

In an unpublished opinion from a circuit court of Missouri, the court stated, “courts must re-examine the theory that a child may have only biological parents and adopt a more flexible ‘functional approach,’ as opposed to the traditional, more strict ‘formal approach,’ for defining family.”²⁰¹ In that opinion, the court adopted “the doctrine of ‘equitable parent,’ which is analogous to the doctrine of “‘equitable adoption.’”²⁰² It is important to note that the child’s mother was supportive in allowing the former partner to maintain rights to the child.²⁰³

In cases where a former partner is not biologically related to the child he has with his partner, the former partner can officially adopt the child. The adoption allows the former partner a recognizable right to the child in a court of law.²⁰⁴ While this solution is not possible in some situations, broad implementation of adoption by the non-biological partner would inevitably give that parent more of a legal right to file suit to affect the parent child relationship. Formal adoption would also allow the custodial parent of the child to obtain financial support for the child should the relationship end.

B. Long-term Solutions

The U.S. Supreme Court has yet to address this issue directly, despite the fact that the issue came before the Court in *Miller-Jenkins v. Miller-Jenkins*, but the Court denied certiorari.²⁰⁵ In the Vermont Supreme Court case, the couple entered into a civil union in Vermont before one partner, (who had a child through artificial insemination with the partner), moved to Virginia when the couple separated.²⁰⁶ The biological mother brought suit to dissolve the civil union in Vermont seeking to have the Court grant her custody rights in accordance with a Virginia order under the Full Faith and the Credit Clause, but the Vermont Supreme Court found against the biological mother and stated that it was not obligated to apply the Virginia order under the Full Faith and Credit

200. *Id.* at 539.

201. *Id.* at 544.

202. *In re T.L.*, 1996 WL 393521, No. 953-2340.2, at *2 (Mo. Cir. Ct. 1996).

203. *V.C.*, 748 A.2d at 544.

204. TEX. FAM. CODE § 151.001 (2006).

205. *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951 (Vt. 2006), *cert. denied*, 550 U.S. 918 (2007); *see also* Robin Cheryl Miller, *Child Custody and Visitation Rights Arising from Same-sex Relationship*, 80 A.L.R. 5th 1, § 15 (originally published in 2000) (explaining the facts of the case).

206. *Miller-Jenkins*, 912 A.2d at 956.

Clause.²⁰⁷ This case represents a problem that many same-sex couples face where they were married in one state and moved to another state before having children.

Due to the growing number of states that recognize same-sex marriage, it is only a matter of time before the Supreme Court addresses the issue of the Full Faith and Credit Clause in same-sex marriages. If the Supreme Court rules that DOMA violates the Full Faith and Credit Clause, and holds that the DOMA is unconstitutional, it would create a great opportunity for Congress to address the inadequacies of the IV-D agency structure.

Since courts look to legislative intent when interpreting laws, recognizing the importance of carving out legislation for this area of law is critical for legislatures in every state.²⁰⁸ Many states do not have clear statutes explaining the rights of former partners to the children they had a part in rearing, so the legislature in every state should respond accordingly. The modern family is no longer comprised of a traditional biological mother and father, and as more states recognize gay marriage, more same-sex couples will start having children of their own.

While adoption certainly gives more rights to the parent, it should not be the only legally recognized option for same sex couples. Modern advances in science have created an opportunity for same-sex couples to experience having a child of their own through surrogacy and artificial insemination.²⁰⁹ As stated above, the federal government must also amend its current interpretation of who should benefit from the IV-D agency services because states are required to implement the federal policies.

207. *Id.* at 951–52. The Court held:

(1) [F]amily court was not required under the Parental Kidnapping Prevention Act (PKPA) to give full faith and credit to order of Virginia court finding mother to be the “sole biological and natural parent” of child and denying partner visitation rights; (2) federal Defense of Marriage Act (DOMA) did not require family court to give full faith and credit to order issued by Virginia court; (3) civil union entered into by parties was not rendered void due to fact that it was entered into when partners were residents of Virginia; (4) partner was a “parent” within meaning of Parentage Proceedings Act; and (5) evidence supported conclusion that mother violated temporary visitation order.

Id.

208. See Jason N.W. Plowman, *When Second-Parent Adoption is the Second Best Option: The Case for Legislative Return as the Next Best Option for Same-Sex Couples in the Face of Continued Marriage Inequality*, 11 SCHOLAR 57, 74 (2008) (“Adoption is a creature of statute, making legislatures a natural for adoption reform.”).

209. *Donor Insemination: The Basics*, *supra* note 15; *Overview of the Surrogacy Process*, HUM. RTS. CAMPAIGN, <http://www.hrc.org/resources/entry/overview-of-the-surrogacy-process> (last visited July 8, 2012).

V. CONCLUSION

As the *H.M.* case illustrates, more courts are forced to decide to what rights same-sex couples are entitled, which has led to a variety of standards.²¹⁰ The problem with multiple standards is that there is inconsistency in the laws, leaving some individuals at a severe disadvantage depending on where they live.²¹¹ Luckily, in the case of *H.M.*, which took place in New York, the court was willing to consider a non-traditional family as equally deserving of the rights and protections that heterosexual couples receive, but that is not always the case.²¹² The Supreme Court of California has also been more receptive to non-traditional families and since they recognize domestic partnerships, the statutes have made it easier to provide same-sex couples with conservatorship and child support enforcement.²¹³ More conservative states tend to adhere strictly to the state statutes, which not only contain limited definitions for mother and father, but also define marriage as between a man and a woman.²¹⁴

Another issue that has begun to play out is that legislatures have responded to courts' broad application of the statutes, by making the statutes even more restrictive.²¹⁵ California is a good example where the courts have tended to provide same-sex with more rights by holding that statutorily defining marriage as between a man and a woman only was contrary to the state constitution.²¹⁶ The California state legislature responded to the court action by passing Proposition 8, which amended the state constitution to exclude same-sex couples.²¹⁷

While many people suffer as a result of the inconsistent laws regarding children from same-sex unions, the children are the ones who suffer the most. In some cases, they are denied access to a person, who by all accounts, has served as a parent in their life. As with any separation, a child who is suddenly forced to deal with a parent leaving their home often-times feels as if he is the reason for the separation. The feelings of guilt and inferiority are even more prevalent in the case of same-sex parents when the parent is denied any access to the child.

210. *H.M. v. E.T.*, 930 N.E.2d 206, 206 (N.Y. 2010).

211. See *Liston v. Pyles*, No. 97APF01-137, 1997 WL 467327 (Ohio App. 1997) (demonstrating the court's unwillingness to extend standing to unrelated homosexual partners).

212. *H.M.*, 930 N.E.2d.

213. CAL. FAM. CODE § 297.5 (West 2006).

214. Ohio Const. art. XV, § 11.

215. Michael J. Ritter, *Perry v. Schwarzenegger: Trying Same-Sex Marriage*, 13 SCHOLAR 363, 366 (2010).

216. TEX. FAM. § 297.5.

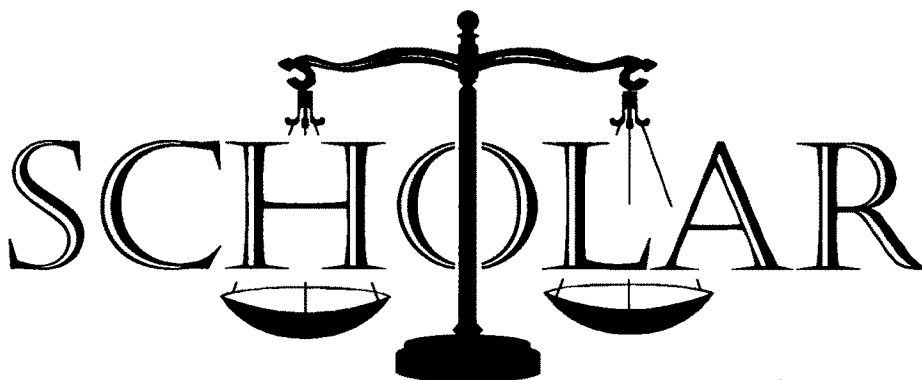
217. CAL. CONST. ART. I, § 7.5 (2008) (*held unconstitutional by Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012)).

A different problem exists for the custodial parent, who is charged with raising the child on his or her own without any support from the other parent. Same-sex couples contemplate having children as much as, or more so than, heterosexual couples because of the intense scrutiny they know they will likely receive from the community. Both scenarios require both partners to commit to having a child, which includes the promise to support the child whether the relationship continues or not. It is imperative for the states with DOMAs to recognize that same-sex partnerships are just as legitimate as their opposite-sex counterpart by officially acknowledging them as such. One reason this is so imperative is because the children of these partnerships are suffering from the delegitimization of their parents' relationship, and the states' refusal to intervene on their behalf. Once any child is brought into the world, it is not only up to both parents to provide for the child, but it is also the duty of the IV-D state agency that is charged by the United States Code to provide services to ensure that the child's best interests are adequately met.

As the issue of same-sex marriage continues to be a topic of debate, with more states becoming receptive to same-sex marriage, it is important for those states to legislate accordingly so that the same state services will be available to same-sex couples and their children. The states that are the most receptive to same-sex marriage have been the most willing to consider the idea of a non-traditional family and find ways to apply the existing state statutes to homosexual couples as well. While most states have some sort of definition for "mother" and "father," it is currently up to the courts to decide how same-sex partners fit into that scheme. It is also important for states to recognize the decision in *Troxel* when drafting legislation, so that it is not so broad that it would be held unconstitutional on substantive due process grounds.²¹⁸ Nonetheless, it is critical for courts to continue to analyze the statutes more broadly until state legislatures take notice and realize the need for clear laws that protect homosexuals as well.

The most beneficial thing that can happen for children of same-sex unions is for the state legislatures to enact laws that include same-sex families in their respective family codes. There must be an expansion of the definition of "mother" and "father" as it is currently defined in the state family codes to provide the necessary support for all children. Unfortunately, it does not appear that state legislatures will independently move toward this notion. Therefore, it is imperative for Congress to enact legislation that specifically addresses this issue, so that all courts will consistently apply the same standard, and *all* children will have adequate interaction with and support from both of their parents.

218. *Troxel v. Granville*, 530 U.S. 57 (2000).



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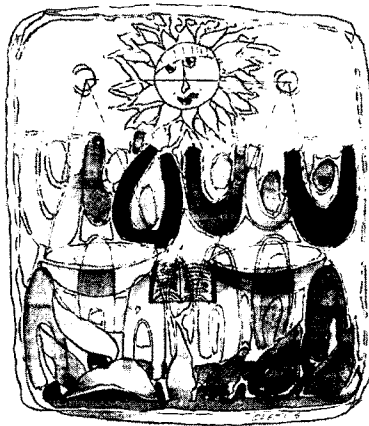
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